MINUTES BY SIR H. S. MAINE,

1862-66.

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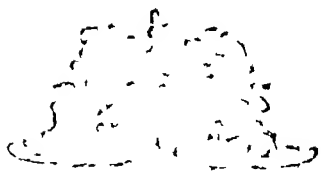

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MINUTES BY SIR H S MAINE.

No 1.

SUSPENSIONS, REMISSIONS AND COMMUTATIONS OF SENTENCES

(29th November, 1862)

Proceedings, Foreign Department, Judicial A, April, 1863, Nos 28 31

I CONCUR with Mr Harington that the power of pardon and the other powers which it includes, are incapable of direct delegation, unless under the provisions of an express enactment This is a universal rule of civilised jurisprudence, and the reason assigned for it by the older jurists is that the executive Governor enjoys this privilege as the Lieutenant of the Deity, so that the legal maxim applies "delegatus non potest delegare" The theory, however, has not prevented the delegation of the power in many countries through the medium of legislation, and of course it is virtually set aside when, as in England, the Sovereign systematically follows the recommendation of a particular functionary

The Secretary is no doubt correct in his impression that the line of demarcation between the executive and judicial exercise of the power of pardon is evanescent Its tendency to become so has long displayed itself in England, and increases every day Originally, as might be inferred from the old theory, the exercise of the power was matter of grace and favour, more recently it came to be controlled by considerations of State policy or popular sentiment, and now at length it is rapidly becoming identified with a rehearing of the whole case before the Home Secretary

I believe that this state of things is felt in England to be eminently unsatisfactory The Home Secretary has of late years always been a lawyer, principally because the conduct of these investigations has become one of his most important duties He is, however, necessarily deprived of what in England is considered the best of all helps to a correct decision, the opportunity of observing the demeanour and language of the witnesses and prisoner The disadvantage under which he is

placed is felt to be so great that proposals have been made, and, I understand, seriously entertained, for substituting a formal new trial before a Committee of the Privy Council for the intervention of the Home Secretary.

In India the system of trying men on paper has long prevailed, and it may well be that functionaries long accustomed to it may have acquired a special faculty of interpreting written evidence which could not be obtained by ordinary experience But I must say I think it a hard and, I may add, a very painful task for the Governor General, and, in cases where his Council is consulted, for Members of Council unused to Indian practice, to have to decide capital questions in the last resort upon materials which, judged by an English standard, must be deemed necessarily imperfect The inherent difficulty must be faced occasionally, for instance, when proceedings of a court-martial are submitted for approval, but I own I look with dismay on the effect of the present state of the law on the Governor General's position It seems that the recent extension of the Judicial Commissioner's powers will frequently render it necessary for the Executive, as possessing the power of pardon, to review quasi-judicially the decisions of this functionary in all non regulation provinces to which the Code of Criminal Procedure has been extended, and it appears further that in one only of such provinces is it certain that the Chief Commissioner possesses the pardoning power The Governor General, therefore, or the Governor General in Council, is in some danger of becoming a regular Appellate Judge. If he has to discharge such functions, he will be, it must be observed, in a much worse position than the Home Secretary in England, for trials in England are universally conducted by a Judge and jury together, and the Secretary of State has always the power of asking the Judge, apart from the jury, whether he is satisfied with the verdict But, whenever the Governor General has to exercise judicial, under the guise of executive, functions, he has in effect to decide an appeal from Judges who have been acting as Judges both of fact and of law

Where the Chief Commissioner, as in Oude, is invested with the power of pardon, there will be no difficulty, as Mr Harington has remarked Where, however, he has no such power, I would suggest that the Governor General should, at all events to a great extent, regard him as the Sovereign at home regards the Home Secretary, that, where his intervention is called for by petition or otherwise, he should be required to investigate the case and state his opinion, and that his opinion should ordinarily, if not always, be adopted by the Supreme Government

(*See No 2*)

No 2.

SUSPENSIONS, REMISSIONS AND COMMUTATIONS OF SENTENCES.

(10th March, 1863)

Proceedings, Foreign Department, Judicial, April, 1863, Nos 28-31

I DO not think it would be illegal for the Governor General, without the sanction of any legislative enactment, to direct such Chief Commissioners as have not the power of pardon to suspend the execution of sentences in case of necessity until the pleasure of the supreme pardoning authority is known

I presume that the question is only put to me with reference to capital sentences

Reprieves, which are suspensions of the execution of sentences, though closely connected with pardons, do not stand on precisely the same footing In England the King alone can pardon, but the old Statute (27 Henry VIII, c. 11), which declares a rule common to all modern systems of law, applies to pardons and remissions of sentences only, *not* to reprieves Many reprieves are, in fact, granted without the sanction of the Crown A Judge can reprieve a convict even after he has passed sentence, if he thinks the pleasure of the Crown should be appealed to, and he can do this even after closing his commission. Sometimes a reprieve can be claimed on behalf of a prisoner as of right, for instance, where a female convict is pregnant or where a convict after judgment becomes insane Nor do I doubt that, where a functionary in England charged with the execution of a capital sentence—such as a sheriff—*bonâ fide* believes that if certain circumstances connected with the convict were known to the Crown, it would extend to such convict its clemency, he would be held justified in deferring execution till the pleasure of the Crown should be ascertained

The state of English law appears to me a sufficient guide in the application of general principles to India Every power distinctly conferred implies the existence of powers necessary to its exercise, and the pardoning power, which is looked upon with peculiar favour in jurisprudence, draws with it all powers clearly ancillary to it, and among these appears to me to be the power of directing local authorities to suspend the execution of sentences in cases where particular circumstances (such as difficulties of communication and distances in India) occasion delay in ascertaining the pleasure of the Supreme Government.

I think, therefore, that the Governor General may legally issue such an order as is contemplated in His Excellency's note, and I am able to say that Mr Harington concurs in this view

Of course this species of reprieve should only be granted on

clear occasion, and I would suggest that, as in the English Home Office, such business should always be taken up at once, and the report of the Chief Commissioner forwarded to His Excellency with as much despatch as may be practicable, in order that, if possible, His Excellency's decision should be notified within the ordinary time for the execution of the sentence It is obvious that the ordinary course of justice should be interrupted as sparingly as may be

The communication of the Chief Commissioner who reprieves a prisoner should be addressed to the *executive* officer charged with carrying out the sentence, and, even if this officer have judicial powers, it should be addressed to him in his *executive* capacity.

(*See No 1*)

No 3.

HEARING OF COUNCIL BY LEGISLATURE

(17th March, 1863)

THE alterations seem to me to be unimportant with two exceptions and unobjectionable with one.

Proceedings, Home Department (Legislative), March, 1863, No 32.

In rule XV, section 5, words have been introduced making the Report of a Select Committee the Report of the majority, and the rule no doubt gains in precision by the change

The new rule which now stands as rule XVII appears to me to introduce a very formidable novelty I have obtained some Bengal papers which show that it was *not* recommended by the Select Committee, but added afterwards at a meeting of the full Council Some discussion on the proposal, which came from one of the Native members, is said to have taken place, but none is reported The Lieutenant-Governor, Mr Eden, and the Advocate-General voted against it, but no one else

I cannot help suspecting it was entered by surprise and without due reflection It does not seem to have struck the Council that, while these rules furnish ample security against irregularity or disorder on their own part, there is nothing to be found in the rules which can be used to check the license of the counsel who may be addressing them The hearing may be one in full Council with reporters present, and I do not see what is to prevent any conceivable subject from being dragged in on the score of private interests being somehow implicated with it. The House of Commons has, it is true, no special rules for controlling counsel, but the House of Commons has always in reserve the power of sending an offender to Newgate

The Bengal Council could, I imagine, refuse to hear any longer an advocate who misconducted himself, but, if the topic were exciting, this would probably not be done, if it were done, without a protest from a minority, and would result at all events in much public scandal

I do not see why the power of appearing by counsel should not at least be confined to appearance before a Select Committee (which except on extraordinary occasions, is the practice at home), and there should be, I think, a rule placing advocates under the control of the chairman

It may, however, be worthy of consideration whether, in a country in which discussion on paper is the ordinary rule, persons whose private interests may be concerned might not be left to state their case in petition Advocates are only employed at home in deference to ancient usuage or perhaps because petitions have dwindled to a form.

No 4.

Office Establishment of the High Court at Bombay

(17th April, 1863)

Proceedings Home Department, 29th April, 1863, No 72

It does not seem possible to put any construction on the 6th section of the Letters Patent other than that the Governor in Council of Bombay is constituted the final judge of the propriety of the High Court establishment But though we are debarred from exercising our ordinary financial control in this matter, still I think that, considering the permanent relation of this Government to the Government of Bombay, and, considering the connection between the Government of India and the most important of the High Courts,—that of Bengal,—it would not be improper that we should urge on the Government of Bombay the excess of the establishment now submitted over the establishment deemed necessary at Calcutta Such a discrepancy is almost scandalous It might be desirable to point out, of course in courteous language, that the Government of Bombay is only empowered to sanction "reasonable" salaries, and that salaries can hardly be deemed reasonable which amount to nearly twice as much as those thought adequate by the Chief Justice of a Court of more extensive jurisdiction A general request to compare the two establishments would, I think, be better than a criticism of separate items, but we cannot avoid calling attention to the two points noticed by Mr Harington I entirely agree that the Commissioner appointed under section 182 of the Civil Proce-

dure Code is to be appointed for the emergency, and to be paid out of the costs, and that there should be no permanent functionary of the kind This Commissioner indeed seems to me very like the Master in Equity under a new name I think also that the parties, and not the public through the Court, are to pay for translations

It will be matter of regret if any tenderness to interests now vested produces a permanent establishment of so extravagant a character

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No 5.

Qualifications for High Court Judgeships

(18th April, 1863)

I CONCUR with Mr Harington's concluding suggestion as to communicating with Sir C Wood

Proceedings Home Department, Judicial, 14th May, 1863 No. 35.

As to the eligibility of Covenanted Civil Servants to the High Court when they satisfy the conditions required for persons of the third class described in section 2 of 24 & 25 Vict, c 104, but do not happen to satisfy the conditions prescribed for the second class, I agree with Mr Harington to the extent of thinking that the appointment to the High Court of a Covenanted Civil Servant who has held in a non-regulation province a judicial office not inferior to that of a Principal Sudder Ameen, would not be positively illegal The rule in construing Statutes is to take words in their natural sense, unless some repugnance or absurdity is the result of so taking them, and I do not find that the natural meaning of the word "persons" in this Act is excluded by this rule But my strong impression is that the framers of the Statute did intend to *divide* the persons qualified into four classes entirely independent of each other Of course, the Secretary of State has it in his power to guide himself practically by the more limited, and, as I think, the intended, meaning of the Act.

It is very desirable, however, to call his attention to the fact that precisely the same point arises with regard to the *first* and *second* classes Many Covenanted Civil Servants are being called to the Bar every year, and the question is whether five years after being called they are eligible to the High Court. My view of the construction of the Act on this point corresponds with that which I have taken in reference to the second and third classes

No. 6

LOCAL LEGISLATION, PENAL CODE, STATUTE 24 & 25 VICT, C 67, S 43

(23rd April, 1863)

Proceedings, Home Department (Legislative), June, 1863, No 7

THIS Bill appears to me to raise a difficult question—one of a class which I have thought likely to arise ever since I read section 43 of 24 & 25 Vict, c 67, for the first time

The question is—What is meant by "altering" the Penal Code?

If one of the Local Legislatures were to define an offence exactly as the Penal Code defines it, or in language of equivalent generality, and then were to assign to it a punishment different from that prescribed in the Code, it would be conceded, I presume, that this would be an attempt to alter the Penal Code and would be beyond the powers of the Local Council But the attempt made in the present Bill is not exactly this Here a particular form, instance or sample is taken of the general offence defined in the Code, and a penalty is assigned different from that which the Code allots to the general offence Is this, which may be called a *constructive* alteration of the Penal Code, beyond the powers of the Bombay Legislature?

In favour of the affirmative view, which I understand Mr Harington to take, there is the wide language of the 43rd section of the English Statute The Local Legislatures are incapacitated, not merely for "altering," but for "altering in any way," the Penal Code of India. It is difficult to contend that by "constructive" alterations one does not alter in *some* way the Penal Code.

The argument the other way must be derived entirely from the inconvenience—and, judged by its *consequences*, the unreasonableness—of the affirmative construction

The Penal Code has been drawn so skilfully and with so much forethought that there is hardly a single conceivable wrongful act which it does not cover by its general definitions But then, as a general rule, the Penal Code contemplates the Queen's subjects in India, apart from any particular capacity they may happen to fill, or from any particular circumstances in which they may be placed Practically, however, offences do constantly alter their character, and deserve a different or severer punishment, through the circumstances of the offender or the capacity he may happen to fill Not to go further than the subject of the Bill, what may be no offence or a venial offence in a man driving a hackery on the Grand Trunk Road may deserve exemplary punishment if done by the driver of a

Calcutta gharry In short, as it seems to me, the punishment assigned to an offence described in general terms will never be adequate to *all* the forms of that offence, however wide be the limits within which the discretion of the Judge who selects the penalty is permitted to range

Now, the matters to which the Local Legislatures can address themselves with most advantage are matters of local and municipal regulation Consequently, the chances are that they will be constantly dealing with extremely special and particular forms of the wrongful acts which the Code describes in general language Every rule which we lay down in local or municipal matters will involve the assignment of a penalty to its breach, and it will be often, and indeed generally, necessary that this general should be heavier than that applied by the Code to the penalty be *precisely* defined—a necessity which will often entail some narrowing of the discretion which the Code allows to the Judge, and this would be "altering" the Penal Code if the construction which I am examining should prevail Is it possible that the English Parliament intended that the Governor General should be invariably invited to express an opinion on municipal penalties, or, in other words, to settle matters which an Imperial authority is not more, but less, able to deal with than the Local Legislatures?

The Bill before me raises this important question, but does not raise it in a very favourable way, for I quite agree with Mr Harington that in this particular case it so happens that the Bombay Council might just as well have been satisfied with the Penal Code But I cannot help seeing that such questions will be perpetually arising in a more perplexing form, indeed, the legislative power of the Local Councils will be almost nothing if they have not at least as great liberty of legislation as is permitted in England to a Railway Company, which always has it in its power to assign, by its bye-laws, special penalties to breaches of railway rule, heavier than those which would be incurred if those offences were prosecuted, as they often might be, under the general law as misdemeanours

A still more serious consequence of the construction which I am calling in question is its tendency to tempt the Local Legislatures into dispensing with the securities of the Penal Code For, though they cannot alter the penalties according to this view, there is nothing to prevent them changing the definition of the crime by omitting a material part of it. This would in many cases be not "altering the Penal Code," but creating a new offence which it has not provided for, and it would be hard to call such an attempt illegal, though it would be contrary to the spirit of the Secretary of State's recent despatch

The *argumentum ab inconvenienti* must always, I know, be received with caution, but the inconvenience here seems to me

so great and so likely to meet His Excellency the Governor General at every turn that, when the question has reached a proper stage (which I do not understand it to have done at present), I should recommend that a joint opinion be asked from the Advocate General and Standing Counsel

(*See No 7*)

No. 7

LOCAL LEGISLATION, PENAL CODE, STATUTE 24 & 25 VICT, C 67, S 43

(*24th April, 1863*)

Proceedings Home Department (Legislative), June, 1863 No 9

MR HARINGTON has been good enough to let me see his further remarks, and I add a few words, chiefly because an inadvertence in my first note (which I have corrected) prevented my bringing out one phase of the argument derived from the inconvenience of supposing that the Local Councils are debarred (except with the permission of the Governor General) from constructively altering the Penal Code

Mr Harington suggests that the inconvenience to which I have referred is greatly mitigated, if not removed, by the provision for obtaining the previous permission of the Governor General If His Excellency could, on having a local Bill submitted to him, give a general permission to alter the Penal Code for the purposes of the Bill, I would acquiesce in Mr Harington's explanation But I do not think that His Excellency can give his permission without considering each instance in which it is proposed to alter the Code This seems to follow, both from the words of the Councils Act "altering in any way" and from the nature of the case, from the duty cast upon him being that of comparing one instrument (the Bill) with another (the Penal Code)[1]

If this be so, His Excellency will have to give an opinion on all parts of the very Bills which an Imperial authority is least capable of dealing with satisfactorily The key to every rule of law is the penalty for its breach, and it will be impossible to say whether the penalties are reasonable without considering the sections of the Bill which fix the rules The Bills on which His Excellency will thus have to give an opinion will be Bills regulating local and municipal concerns, and he will have to do this, not after he knows that the measure has been fully discussed by persons on the spot or near it, but beforehand, and without the power of ascertaining the changes which may be introduced by a Select Committee

On noting down the list of subjects (in section 43 of the Councils Act) which the Local Legislatures are prohibited from dealing with except under permission, it will be seen that the Bills falling under each head (except the 4th) have a distinct common character But if the 4th prohibition covers constructive alterations of the Code, the Bills to which it applies are altogether miscellaneous and, as it seems to me, include nearly all the measures which would naturally be brought before a Local Legislature This consideration, so far as it goes, seems to me an argument for thinking that Bills having for their main and direct purpose the alteration of the Penal Code are the measures intended, any such measure would be "a law or regulation *for one of the purposes* thereinafter mentioned"—language which seems to me slightly in favour of the above view

(*See No 6.*)

No 8.

SERVITUDE IN OUDE

(*25th May, 1863*)

Proceedings, Foreign Department, General, July, 1863, Nos 38-40

IT is almost impossible to form a clear opinion on the questions raised in these papers without seeing the actual contracts to which they refer. Almost everything will depend on the phraseology of the particular contract, and a good deal on the form of the suit Some principles may, however, be laid down

An agreement to be a man's serf or slave is invalid in law, both as being against public policy and in most cases as amounting on the part of the contractee to the offence made punishable by the 370th section of the Penal Code. It is not very easy to frame a contract in English which would come within this description, but I can quite conceive such an agreement in India. If, for example, there had once existed in Oude or elsewhere a system of undoubted slavery, which had become illegal from the introduction of our laws or from some other cause, and if a contract were made which by its terms or its language placed one of the parties in the exact position in which he would have been placed as a slave while acknowledged slavery lasted, then such a contract would be entirely bad in law, and no damages would be recoverable for its breach.

But a mere contract to serve, that is, to render services, whether domestic or agricultural, is perfectly legal without reference to the period for which it is made If it be for an unlimited, that is, an indefinite, time, then, as the first orders of

Government correctly stated, it will be presumed to be for a single year But, if definiteness be given to the period by agreeing to serve for a term of 99 years or for life, the contract will still be good, and no such presumption as that just mentioned will arise So far I concur with the Advocate General When, however, Mr Cowie goes on to say that damages for the breach of such contracts must be calculated with reference to the period of limitation, although I do not dispute the literal truth of the proposition, I think it requires explanation The English writers on the law of contract, one of whom is quoted by Mr. Harington, hardly notice contracts to serve for life or 99 years (if one so long live) They merely say that such agreements are not illegal, but add that they are so improvident *ex facie* that hardly any sum would be too small to award as damages for their breach Mr Cowie's statement must, I think, be taken as true only of the maximum damages which under any circumstances can be awarded It is not absolutely true that very long contracts to serve are necessarily improvident. There is one case in particular, that of an agreement to serve in a trade which is conducted on a trade secret, in which contracts to serve for very long periods are not uncommon, for the breach of such contracts as these, even perhaps when they contemplated service for the whole of life, it might be proper to take the period of limitation as a guide to the amount of damages But, in respect of such contracts as are described in these papers, the other and more usual rule is clearly, I think, the one to be followed, and the smallest possible damages should be given to a plaintiff suing on their breach

There are, however, many expressions in these papers which make me suspect that the actual contracts on which the question arises do not take so simple a form as I have been supposing It may be that the suits mentioned in the papers are not suits directly instituted to enforce agreements to serve, but are merely suits to recover bond-debts, the defendant being in fact bound to labour, not by express agreement, but simply by the compulsion of his debt, which is kept hanging over him Or, again, the defendant may have acknowledged that he owes a certain sum and may have contracted to work it off at a certain rate In the first case, unless some independent defence can be pleaded to the suit, the decree for payment of the debt must be passed against the defendant, in the last case, the decree can only be for payment subject to an account for the sum worked off

On the assumptions I have just made, the mischief in Oude is not the existence of any particular system of servitude, but the improvidence (which, I need not say, is not confined to Oude) of the labouring class in taking advances or in acknowledging debts which have accumulated at usurious interest No direct relief can be given to labourers who have thus entangled themselves, but indirectly the Courts in Oude could probably

mitigate oppression by bringing it to the knowledge of the labouring class that no man is bound to take upon himself advances made to, or debts incurred by, his father, otherwise than to the extent of any assets he may have received by inheritance I say this because it seems to be hinted in the papers that the debts sometimes descend from father to son It would also be well to make the *280th, 281st and 282nd* sections of the Code of Civil Procedure as notorious as possible, under which a very simple system of bankruptcy is provided for debtors under one hundred rupees

Till I know more of the contracts in question, and more of the nature and extent of the evil complained of, I am not prepared to say that any legislation is required If the contracts be such as I last assumed them to be, the only legislative relief admissible would take the shape of extending the limit of bankruptcy

(*See Nos 92 and 98*)

No. 9

COURTS OF SMALL CAUSES.

(*8th June, 1863*)

Proceedings, Foreign Department, Judicial, A, July, 1863, Nos 34 36

THE first reflection which these papers suggest is that one does not see why in the original establishment of the Bangalore Small Cause Court the Presidency Towns Act was adapted to it rather than the Mofussil Small Cause Courts Act. The jurisdiction of the Court is limited to Bangalore cantonment (excluding the town), and Bangalore is, or is likely to be, largely resorted to by Europeans from Madras, but the peculiarities of the Presidency Towns Small Cause Courts Act do not arise from its applicability to large cities or to a European population, but from its applicability to places in which the local law is the law of England The Act is framed with a constant tacit reference to English law Now, though Bangalore cantonment contains many persons subject to British military law and some who are personally entitled to the benefit of English law, yet its local law is the law of Mysore, whatever that may be To such a state of things the Mofussil Act is much better suited than Act IX of 1850 By introducing several clauses of the former Act into his regulations, the Judicial Commissioner has mitigated the inconvenience entailed by the mistake of building on a wrong foundation, but he has by no means removed (as will be partially shown presently) all the references to English law which are included in Act IX but which have no application to Bangalore

As the Court has been some months in operation, it is too late to correct the original mistake, and, on this assumption, I think the variations from Act IX proposed for the regulations desirable on the whole and well-considered There are, however, a few remarks to be made which I will offer, following the order of the regulations, of which the numbers correspond with the *new written numbers* in the printed pamphlet enclosed

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XX—I agree with the Judicial Commissioner as to this regulation, except that I think it is a pity that the Court should decline to investigate open partnership accounts *if* it has a proper establishment All depends on the Court having an accountant attached to it to whom it can refer the accounts If it has such an officer, there is no reason why it should not settle disputes which I understand to be excessively common among natives, who constantly quarrel before their accounts are balanced. But, if there is no accountant, it is useless to ask the Court to occupy whole days in doing sums in arithmetic.

* * * * * *

XXVIII—Here is an example of English technical expressions What is an executor and administrator (who are ecclesiastical functionaries, strictly speaking) in Mysore, and what is the difference between them? I should prefer the general phrase "legal personal representative," or the clause might run —"any executor, or administrator or legal personal representative"

XLVIII—The words proposed to be added are not well chosen The Judicial Commissioner's Court *is* the "highest Judicial Court," so that the phrase "that is to say" is out of place But I object altogether to this quasi-appeal, not only for the cogent reasons assigned by the Judicial Commissioner, but as contrary to the principle of the Small Cause Court system, such an appeal would give no security to the litigant, while it would diminish the Judge's sense of responsibility

XLIX—This is again a regulation including a fragment of pure English law The distinction between law and equity, as two separate constituents of positive jurisprudence, is unknown beyond English law See also No. XXXII. I should prefer section 13 of Act XLII of 1860

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LXXV—It will be prudent, I think, *not* to allow immoveable property to be taken in execution We know too little of the land law of Mysore to know what feelings we may shock or what subordinate rights we may override by subjecting immoveables to the process of a Court of summary jurisdiction

LXXXV—The suggested proviso is very vague and unsatisfactory The best course will be to confine the jurisdiction to cases where the relation of landlord and tenant is *admitted* to

exist Where it is denied, a question of *title* will in nine cases out of ten be opened up

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With respect to the Judicial Commissioner's suggestion that the jurisdiction should be extended, the best course will be, I think, to empower the Judicial Commissioner to enlarge it with respect to all suits or any class of suits to a maximum amount of Rs 1,000. I would not give an appeal universally in cases exceeding Rs. 500, but the Judicial Commissioner might at his discretion declare that an appeal should be allowed in a certain *class* of cases The extension of the jurisdiction to suits of *any amount* is opposed to the theory of Small Cause Courts

I may observe that there are two principal elements in the Small Cause Court system—the smallness of the sum at stake and the qualifications of the Judge This peculiar summary jurisdiction would be indefensible if both were not present The smallness of the sum limits the extent of the injustice, if injustice is done the superior qualifications of the Judge are a security against injustice being done at all. The plan of the Judicial Commissioner mentioned above violates principle by dispensing with the guarantee afforded by the pettiness of the sum at stake, and I must say that the Madras Act, put up with these papers, violates principle by taking comparatively small care for the efficiency of the Judge If Moonsiffs and Sudder Ameens are not able to decide ordinary suits without the check of an appeal, neither ought they to be trusted to decide small causes without similar protection for the suitor

(*See No. 52*)

No. 10.

Act XX of 1863, Religious Endowments

(*18th July, 1863*)

Proceedings, Foreign Department, Revenue, September, 1863, Nos 49-51

I do not quite agree with the Advocate General as to the limitation he would impose on Act XX of 1863 The language of the general prohibitory section (section 22) is extremely strong It is not necessary, however, to decide the point, as the Advocate General admits this Coorg case to be within the principle of the Act, and there can of course be no doubt that the Secretary of State wishes the case to be treated exactly as if it fell within the statutory prohibition

It will simplify the matter to consider what is the policy of Act XX, which is understood to be the general policy of Govern-

ment with reference to religious endowments in India That policy is to transfer the endowments to a custody which furnishes reasonable securities for their preservation, but, that transfer once effected, not to interfere further in any emergency, however serious, but to leave the protection of the endowments to the ordinary tribunals The guardianship of the endowments is in fact transferred by the policy of Act XX from the Executive to the Judicial power

When this is once understood—when it is seen that the transfer to private trustees, though it ought to be effected in the best possible way for the interests of the endowment, is to be a transfer *out and out* and *once for all*—the weak point of many of the expedients which have been suggested in this Coorg case will be easily perceived. Neither the last suggestion of the Commissioner of Coorg nor the simpler plan of Mr Bayley is admissible, because each implies some continuing act by an officer of Government, which, though it be no more than an endorsement, is yet against the principle which has prevailed

On the whole, I think that there is nothing to be done except to follow the advice of the Advocate General to allow the present state of things to continue till the objections to a landed endowment have abated. There is no positive illegality (if Act XX apply to the case) in going on with existing arrangements till a favourable opportunity for cleansing them presents itself

The difficulty should, I presume, be represented to the Secretary of State

(*See Nos 62, 73, 80 and 87*)

No 11.

CHOLERA

(25th July, 1863)

I AGREE with the Resident that the second and third sections of the report should be published without delay, but that there would be no advantage in publishing the first section The state of things disclosed by this last-mentioned section is most melancholy, but the attention which it imperatively demands should be given by the Government, and not by the public

Proceedings, Military Department, C, September, 1863, No 552

I would not publish the third section without the second The second section, giving the scientific results of the enquiry, appears to me extremely valuable and unusually free from the vice which I have generally observed in disquisitions on sani-

tary subjects—the assumption of the point to be proved. As the President has observed, there is some trace in the papers of a leaning towards the theory which has so long obstructed the progress of sanitary knowledge—the theory that, in order to account for an outbreak of cholera or any other disease, it is sufficient to point to the vicinity of a cesspool or the impurity of some neighbouring tank or well But, on the whole, conclusions from the facts bearing on the subject are drawn in the second section with unusual caution

Another reason for not publishing the third section without the second is that the recommendations made in the third section appear to me to go occasionally a good deal beyond the proofs of their expediency or necessity, which may be collected from the section preceding The condition of the public mind on these topics is such that any hesitation of the Government in trying the most costly and extensive experiments, when recommended by any sort of authority, is regarded almost as a crime, even though the practical advantage to be looked for on scientific grounds from the outlay is in a high degree problematical

The Cantonment Magistrates Bill, which has been published by order of His Excellency the Governor General, will, if it becomes law, very greatly facilitate in military stations the adoption of many measures advocated by the Commissioners on rational evidence of their desirableness

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No 12.

ACTS VI OF 1857 AND XXII OF 1863, STATUTE 24 & 25 VICT, C 67, S 25, "LOCAL GOVERNMENT"

(9th September, 1863)

DEAR LORD ELGIN,—These papers raise some rather perplexing questions Act XXII of 1863 (the Works of Public Utility Act) assumes throughout that Act VI of 1857 (for the acquisition of land for public purposes) is in force everywhere in India. It seems, however, that the authorities in most of the non-regulation provinces are not taking land under Act VI, but under certain rules which they assume to have the force of law The question which they discuss in the papers (a question wrongly stated, in *my* view) is whether Act VI of 1857 shall be *extended* to the territories in which it is not acted upon

Proceedings, Foreign Department, Revenue, June, 1863, Nos 4-7

The assumption made in Act XXII of 1863 *ought to be* perfectly correct, for it is a perfectly general Act and applies to all parts of British India. The Act is, however, to be put in force by the "Local Government," and in section 39, which gives the

On the other hand, any rules promulgated between the passing of Act VI and the passing of the Indian Councils Act would have the effect of repealing Act VI so far as they are inconsistent with it, provided they were promulgated in non-regulation provinces by the Governor General in Council, or in certain cases by the Lieutenant-Governor There appear, therefore, to be three classes of rules to be considered —

I. Rules promulgated by the Governor General in Council in non-regulation provinces previously to the passing of Act VI of 1857 These are repealed so far as they are inconsistent with Act VI

II. Rules promulgated similarly between the passing of Act VI and the passing of the Indian Councils Act These repeal Act VI so far as they are inconsistent with it.

III Rules promulgated in any manner since the passing of the Indian Councils Act These are absolutely void unless published *under* Act VI

Practically the only serious difficulty is likely to be created by class II, and I think Your Lordship's first step should be to ascertain from the Foreign Office or from the Local Governments whether any rules for taking land were promulgated by the Governor General in Council or by the Lieutenant-Governor in non-regulation territories, between the passing of Act VI and the passing of the Indian Councils Act, or whether during the same interval any old rules were formerly republished by the same authority

If nothing of the sort turns out, as is not unlikely, to have been done, then Your Lordship's course is, I think, comparatively simple, namely, to inform all the authorities of non-regulation territories that Act VI of 1857 supersedes all their rules in so far as it is inconsistent with them, and, further, as respects territories directly administered by the Governor General in Council, to confer on all the Chief Commissioners who have not received them the powers contemplated in Act VI.

(*See No 19*)

No. 13

COURT OF VAKEELS

(*14th October, 1863*)

DEAR LORD ELGIN,—The Court of Vakeels being an entirely artificial institution, not belonging to the judicial machinery of civilized States, it would require pretty strong evidence, in the absence of express consent, to show that it has obtained authority anywhere by prescription I do not see that there is really any evidence worth attending to showing that the Court has possessed authority in Central India The fact that subjects of Scindiah and Holkar have occasionally submitted to its jurisdiction proves nothing at all, both for the reasons stated by the Under-Secretary and because there is nothing irregular in any defendant's submitting, if he pleases, to the jurisdiction of any Court which he thinks likely to do him justice

Proceedings, Foreign Department, Political, January, 1864, Nos 105 115.

I do not doubt that the Paramount Power might impose the authority of this Court on the Chiefs of Central India, for as we do not allow them to go to war with one another, we claim the right as a consequence, and undertake the duty, of preventing those quarrels and grievances which among really independent Powers would lead to international conflict

But here, as Colonel Durand remarks, the authority of the Paramount Power is exercised more directly through the system actually established in Central India than it would be through the Court of Vakeels And this is in itself some proof that the Court has not exercised jurisdiction in Central India otherwise than incidentally and casually.

The question is really one of expediency. If the Courts of the Political Agents in Central India are really more expeditious and efficient in adjudicating upon interjurisdictional questions than the Court of Vakeels, there really seems to me to be an end of the matter, for, so far as the political interests of the British Government are concerned, they are rather favoured by the Central Indian system than by the other

I do not understand the grievance involved in a Rajpoot plaintiff having to proceed in one way when the defendant is a subject of Scindiah, and a Malwa plaintiff to proceed in another when the defendant is a Rajpoot While there is no uniformity between the remedies open to subjects of civilized States, we need not be surprised at the absence of it in the remedies available to subjects of Native Indian Governments

I think, however, it might be explained to Scindiah and Holkar that, though there be no obligation on them to acquiesce in the jurisdiction of the Court of Vakeels, yet that when a subject of their own, whether resident in their territories or elsewhere, voluntarily submits to the jurisdiction of the Court of Vakeels by appearing or defending his case before it,—or where, from the locality of the offence, act or other matter in question, he has been brought within its jurisdiction,—they would do well to follow the usages observed by civilized States and to allow the judgment to be enforced by their own authority without reopening the controversy Such a practice does not imply any derogation from the authority of their own tribunals It is only what one community owes to another

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No. 14.

GRANTS OF MONEY AND LAND

(17th November, 1863)

I CONCUR in thinking that Khyrooddeen ought not to suffer for an administrative blunder, and I consider that, if any alternative is offered to him, one branch of it should be the exact pension which he was originally intended to have

Proceedings, Foreign Department, Finance, November, 1863, Nos 2 4.

As to the general question, though pensions have no doubt the political advantage which the President describes, they are economically very disadvantageous as compared with gifts of

land, for land retained in the hands of Government has very rarely its true value, and sometimes no value at all

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No. 15.

Legal Education of Civil Servants

(2nd December, 1863)

I CONCUR in Mr Harington's conclusions, and, substantially, in the grounds assigned for them

Proceedings, Home Department, Judicial, 21st March, 1864, No 64.

If there is any part of his Minute to which I feel inclined to take exception, it is that in which he palliates (or rather his authorities palliate) the deficiencies of the Zillah Judges Complaints about persons do not readily find their way upon paper, but, if I am to judge from the course of conversation in India, particularly among gentlemen who are themselves acknowledged to be the best lawyers in the service, I should be disposed to believe either that we have fallen on an exceptional period in respect of the qualifications of Zillah Judges, or that the executive branch of the service so takes precedence of the judicial as to absorb much more than its due proportion of the available talent in the country The last, I suppose, is the true explanation, to judge at least from a fact which came to my own knowledge A Civil Servant, to whose continuance in executive employment there were apparently some objections, was, about six months since, appointed by the Bengal Government to a Judgeship in spite of his energetic protestations of his incompetency, and even his avowals of his ignorance of the language in which justice was to be administered

Nor can I quite agree in the supposed simplicity of Indian law as compared with English I suspect that this simplicity, where it seemed to exist, came from a cause which is ceasing to operate—the fact that there were not legal advisers, pleaders and advocates, to take, on behalf of litigants, the subtle distinctions of which no law admits so readily as a law which, like that of India, is very slightly settled and ascertained The only department of Indian law on which legal ingenuity has been much exercised—the Law of Revenue and Tenure in Bengal—appears to me as difficult and intricate as any system of jurisprudence in the world But we will hope that the growing intricacy and technicality of Indian law will be obviated by the true remedy—the development of clearly-written Statute law, and the introduction of a code or substantive body of fundamental rules

From the best attention I have been able to give to the matter I have come very decidedly to the conclusion that the

real key to this educational difficulty, which is very real and very pressing, is to be found, both as regards law and language, not in India but in England Make what rules we will, this is not a good country for education, which will always here be costly and inefficient The presence of official responsibility is necessary to make a man work in such a climate The only alternative is to keep the student-servants somewhat longer in England, to which detention the chief objection is that it adjourns the period of coming out But when we have once sacrificed the undoubted advantage of bringing youths to India just when manhood is beginning, that is, at about 18, I find that the best Indian physiological authorities do not think that differences of a year or two in age are of any importance. I would keep, therefore, the students in England a year longer, and would have that year entirely devoted to vernacular languages and law As soon as they come here, I would at once put them to real work, and they would then begin the only education which is efficiently carried on in this country—education in the application of knowledge already gained, and in the oral use of languages already learned

I am very far, indeed (as I have stated elsewhere), from undervaluing the legal course traversed by students in England during their year of probation But the defect of that course is that it is somewhat over-brief, and, as might be inferred from the list of books given by Mr Harington, that it is rather too bookish, this last is a material fault in a country like England, where scarcely any legal literature exists except manuals for practitioners. I am inclined to suggest that (if the subject is sufficiently within our cognizance for us to take the step) the Secretary of State might be moved to enter into communication with the only body in England which undertakes to give a systematic legal education—the Inns of Court. They have a very competent staff of teachers and lecturers, and I must here explain that the remark quoted by Mr Harington from my Minute is meant to be strictly limited to inferior lecturers The best substitute for a good legal educational literature, which, as I have said, does not exist in England, is a skilful lecturer or oral teacher, and, if proper arrangements were made, there would be no difficulty in extending, under the superintendence of the Inns of Court, that most valuable portion of a student-servant's English training which consists in attending Courts and taking notes of cases

This system would involve the Secretary of State in some additional expense, but it is abundantly clear, from Mr Harington's figures, that the Indian Exchequer would save largely on the whole It would further involve the sacrifice of a principle to which I believe that the Civil Service Commissioners are inclined to adhere—the principle of allowing the young men to prosecute the studies of their year of probation in any

part of the country which may be most convenient for them But bringing the students to London to learn laws and languages well is, at all events, preferable to bringing them to Calcutta, Madras or Bombay to learn law badly and language not better than at home

As respects the Madras proposal, I concur in Mr Harington's suggested reply It would be ungracious to refuse the moderate sum asked for a Law Lecturer if that part of the scheme stood by itself, but the other branch I regard as thoroughly objectionable If a new office is created in the Courts for the training of students, one of two things will follow— If the duties are real and actual, the young man will certainly learn, but it will be at the expense of the suitors, if, on the other hand, the duties are nominal, it is absolutely certain that, in the absence of that stimulus which is absolutely needed for work in this country, the execution of the duties will be as merely colourable as the duties themselves

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No 16

UMBEYLA CAMPAIGN

(18th December, 1863)

Proceedings, Military Department, C, December, 1863 No. 835.

I am very glad of the opportunity which Mr Harington's observations afford me of recording a statement as to the part taken by the late Viceroy in ordering the expedition against the Sitanas I was in Simla when he consented to it I was not there in a strictly official capacity, nor was I consulted as to the expediency of these operations, but I am sure, from frequent conversations with Lord Elgin, that he acquiesced in them with the greatest hesitation and reluctance, and only because he considered that the evidence submitted to him by the Punjab Government, both as to the danger to be apprehended from the presence of the fanatics on our frontier and as to the facility with which they could be expelled from their positions, was altogether overwhelming

There is much in the substance of Sir Charles Trevelyan's arguments with which I agree, although I think that his language and illustrations convey an impression of more difficulty and peril than really characterize the existing state of affairs So far as his Minute consists of argument, I must claim the benefit of it as a justification for the course taken by the Government of India, in the interval between receiving intelligence of the Viceroy's dangerous illness and the arrival of Sir William Denison in Calcutta That course appears to me to have certainly not erred on the side of timidity There was much in our position which might have made any Government hesitate

We were two thousand miles away from the theatre of action, the greater part of our Military Secretariat was at Lahore, the most powerful member of the Government was from day to day expecting to be replaced by a successor, it was for some time doubtful whether, technically speaking, we had any right to interfere at all Yet we gave an order that (subject to only one condition) the force engaged in the hills should, in the face of the enemy, retreat to the plains I think that we thus went to the very limits of prudence, and, while I entirely concurred in the expediency of that direction, nothing should have induced me under the circumstances to assent to it, if it had not been accompanied by the proviso that the withdrawal should only take place if the Commander-in-Chief thought that it could be effected without military disaster and without loss of military reputation

Out of this proviso has arisen my sole difference with Sir Charles Trevelyan, and my sole reason for concurring with the Governor General's proposal that a forward movement should take place It is well known to all of us that, down to the moment of the receipt of the order the Commander-in-Chief, and the executive military officers in the Punjab generally, did not believe that the withdrawal to Peshawur could be carried out without disaster and without grievous loss of military reputation

If Sir C Trevelyan had argued that the dangers which he so vividly paints were of such magnitude and imminence that, rather than face them, it was better to incur disaster and sacrifice reputation, then, though I should be loath to believe that this was the issue really before us, I fully acknowledge that his views would merit our very gravest attention and consideration But Sir Charles Trevelyan expressly states his belief that the retirement of the force from its present position cannot be seriously felt as a military difficulty It is impossible that this belief should not affect, and dominate, his whole view of the case, just as my own misgivings on the point, founded on the authority of Sir Hugh Rose and the officers immediately around him, have certainly affected mine

The question, therefore, appears to resolve itself into a difference of opinion, on a strategical point of some delicacy, between Sir Charles Trevelyan and the Commander-in-Chief On such a point I am forced to defer to the authority who speaks within the sphere of his own art, and to the officer who is ultimately responsible for the conduct of all our military operations

The alternative of unconditional withdrawal being thus, in my judgment, excluded, nothing remained but to allow the force to strike a blow or a series of blows for the purpose of disengaging itself It is hazardous to speak confidently of the progress of operations which have hitherto so signally disappointed

their designers, but, to judge from the events which are being announced at the moment of my writing, the wisdom of the recent change of orders appears to be borne out

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No. 17.

Study of Persian

(19th January, 1864)

Mr Harington's argument on the question at issue seems to me conclusive

Proceedings, Home Department, P P, 20th February, 1864, No 36

The points which he establishes are these —

1 That a knowledge of Persian was originally made compulsory for a reason which has lost its force

2 That the retention of the obligation is attributable to an accident, or rather to a series of accidents

3 That the argument for retaining it, if carried to its consequences, would prove the officers of the Hindoostani-speaking province of Behar to be generally incapable of discharging their duties

4 That the argument fails wholly in its application to military officers, who discharge judicial and administrative functions *pari passu* as the civilians in those districts of India in which the purest Hindustani is spoken

5 That the footing on which it is proposed to place Persian is exactly that on which it is placed with respect to military officers, who all but monopolize the political appointments That footing is, that its acquisition should be voluntary, it being understood that nobody who has not passed this voluntary examination is to be preferred to employments for which a knowledge of Persian is demonstrably required

In short, it is evident that the reasoning by which the compulsory obligation to study Persian is advocated proves a great deal too much And this, I take it, will always be the fate of all arguments which are invented by an after-thought, when the orginal considerations for which they are substituted have lost force or have disappeared

The replies from the North-Western Provinces and the Punjab are much what I expected Those officers who are for retaining the compulsion do not, for the most part, allege more than that Persian is important—a proposition which nobody has denied The gentlemen who go further than this are gentlemen of great reputation for a literary—as distinguished from a merely practical—acquaintance with Oriental languages

It would not have been difficult to divine this result.

The opinion which has impressed me most is that of the distinguished Judicial Commissioner of the Punjab. "Life,"

says Mr Cust, "is short, Art is long, in this, as in other things, we must have a minimum for the many, and a maximum for the few We must not waste the precious years of a man's life between twenty and twenty-three, when he is able to acquire anything, and what he acquires remains for his life I am no opponent of Oriental studies I devoted my youth to them, and studied with success all the first languages above alluded to, and Arabic in addition, but I sometimes wish now that I had studied the Roman and English translations instead of following up dead Orientals beyond a certain point I wish others to avoid my error"

This pregnant passage goes to the root of the matter The simple truth is, that the compulsory study of Persian—a difficult classical and in India practically dead language, of limited though considerable usefulness—stands in the way of any effectual reform of the educational curriculum of young Civilians In particular, it obstructs their acquisition of the form of knowledge most urgently needed in the India of the present day—knowledge of law If we are to choose between the incapacity of a Judge to decipher without aid the earlier records of his Court, and his incapacity to interpret the bearing on them, when deciphered, of legal principles, the first branch of the alternative involves immeasurably the lesser evil

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No 18.

OVER LEGISLATION, SPITI, REGULATION I OF 1873

(28th January, 1864.)

Proceedings, Foreign Department, Political, A, February, 1864, Nos 286 287

IF I am compelled to answer this reference from a strictly legal point of view, I must say that the Officiating Judicial Commissioner is right, and that the Penal Code, etc, apply to the Valley of Spiti

In the remarks of the Punjab Government, however, I may be permitted to say that there is some confusion of thought. The inapplicability of the Penal Code and of the Code of Criminal Procedure to such regions as Spiti does not arise from anything in the Codes or in the people, but from the want of skilled judicial agency It matters little, so far at all events as criminal law is concerned, what law a race, either civilized or savage, lives under People do not look into a law to see whether they may or may not commit a crime, they are guided by their general moral instincts

If skilled agency can ever be employed in Spiti, there is no reason why the Codes should not apply, nor would any very high degree of skill be required, for those Codes, if reasonably interpreted and enforced, are as simple as any written law can

be But of course cases may arise where it is necessary to leave authority in the hands of a savage like the Nono, and to *him* it may be granted that the Codes are inapplicable But I confess I am at a loss to say what is the proper remedy Are we to take upon ourselves the responsibility of the Nono's jurisdiction? Is he to be allowed to kill, flog, fine or imprison under *our* authority? The fact is there is no point of contact between the administration of law by civilized men and savages, and the reference is something like asking the English Parliament to exempt from English law those tribes of gipsies who are governed by patriarchal usages of their own which are known to be enforced by very effectual penalties

The answer to the reference had better, I think, be demi-official, but, if that be not possible, I think the Deputy Commissioner should be asked to frame some simple rules, *not inconsistent with the Penal Code and Criminal Procedure Code*, for the Nono's guidance So far from the condition which I have underlined rendering his task more difficult, it will greatly simplify it, and thus any positive illegality will be avoided

I could not undertake to propose an enactment exempting Spiti from the Codes, unless some definite system were to be substituted for them I should at once be asked what law Spiti would be under, and I cannot undertake to defend the Nono's principles of justice

Still less could I give effect to the formidable proposal of the Lieutenant-Governor The inapplicability of each law should be shown separately

The question strikes me as having been brought up, not so much from any real difficulty being felt, but because it is supposed to be an extremely favourable illustration of some theories which I have observed from more than one indication to be current in the Punjab I think it might be as well to remind the Punjab Government that the difficulty does not arise from anything in the people, but from the want of agency sufficient to carry out even one of the simplest of written laws

(*See No 85*)

No. 19.

ACT VI OF 1857, STATUTE 24 & 25 VICT., C 67, S 25

(*18th February, 1864*)

THE opinion which I gave to the late Viceroy at Simla, and to which I still adhere, was that the rules, laws and regulations, established as law by section 25 of the Indian Councils Act, are established as law *from the date* of their promulgation Their

Proceedings, Foreign Department, General, March, 1864, Nos. 138-172.

It would further be well to remind the Lieutenant-Governor of the Punjab, as suggested by the Under Secretary, that since 1861 he has ceased to have any legislative authority either for the purpose of originating new laws or of *extending* old ones

But, with regard to the operation of Act VI of 1857 in the Punjab a rather delicate question arises I have no doubt that this Act repealed all circulars of the Punjab Government issued previous to its receiving the Governor General's assent and inconsistent with it But it seems that in January, 1861 (prior therefore to the passing of the Indian Councils Act), the Book Circular 14 of 1861 was issued by the Punjab Government, and the question is whether that circular had the effect of repealing Act VI of 1857 to the extent of any inconsistency.

This question resolves itself into the question whether the book circular was a re enactment or merely a re promulgation of former circulars On the whole, and not without much hesitation, I have come to the conclusion that it was only a re-promulgation, and therefore did not carry forward the date of the rules which it contained Such a conclusion can only be the result of the impression left on the mind by the whole frame of the circular, and I should therefore be very glad to know whether Mr Harington agrees with me I call attention to the reference to the time ("from time to time") of the older circulars in paragraph 1, to the express statement in the same paragraph that the consolidation is only for purposes of reference, to the omission of the procedure of railways as stated in paragraph 2 merely to render the subject clearer, and to the general form and language of the circular, which has more the air of a treatise elucidating and explaining the law than of the enactment of a law in however irregular a shape

If I am right, Act VI of 1857 is not repealed by this book circular, but itself repealed all circulars of the Punjab Government prior to its passing Unless, however, I were actually to see the circulars referred to in the margin of the first page of

the book circular of 1861, beginning with No 9 of 1858, I could not positively say whether Act VI of 1857 has been as slightly interfered with as the Under-Secretary has gathered from his conversation with Mr Cust

(*See No 12*)

No 20.

AGRA SUDDER COURT, CIVIL JUSTICE, COURTS OF SMALL CAUSES

(*22nd February, 1864.*)

Proceedings, Home Department, Judicial, 4th April, 1864, No 19

THESE statistics of the Sudder Court at Agra fill me with dismay. While admitting that to some extent they are explained by the papers, I must say that, so far as the figures are concerned, I have seen nothing resembling them except the returns representing the condition of the unreformed Court of Chancery in England nearly a century ago, and on behalf of that English Court, whose delays passed into a proverb, I must observe that it had to apply an infinitely more intricate and difficult system of law than the Agra Court has to administer, and that it commanded only part of the time of its principal Judge (the Lord Chancellor) and the whole time of only one Judge besides, the Master of the Rolls

The injustice and demoralization caused by such a condition of judicial business, however occasioned, are almost beyond conjecture If the simple consideration be taken into account that in every suit one party or set of parties must, in some sense, be in the right, and another party or group of parties in the wrong, the heavy injury to private interests and morality inflicted by keeping righteous litigants for so enormous a time from the enjoyment of what should be theirs, and maintaining wrongful litigants in the enjoyment or expectation of what should not be theirs, becomes too plain a matter for illustration But there is a less general consideration, which is of even more importance It is the habit of the Native mind to look on all litigation as a species of gambling This peculiarity must be immensely strengthened by these extraordinary delays The further off the decision in a suit is pushed, the more does it assume the air of a chance We shall never prevail on the Natives to think that, before they institute a suit, they ought to consider whether they have the right to institute it, until the ultimate decision is brought near enough to be reflected upon

In this country the most probable result of such an arrearage is a great increase of that widespread immorality which arises from the comparative incapacity of the Natives to associate legal claims with moral rights In England the consequence would be

a general revolt of sentiment against the tribunal which was unfortunate enough to have its files in such a state Though the English Court of Chancery has been thoroughly reformed and cheapened, and though it administers a law much superior in many respects to the jurisprudence of the Courts of Common Law, it has never overcome the popular disfavour brought upon it by Lord Eldon's dilatoriness, and many important legal rules and proceedings are prevented from becoming universal because they are discredited by association with the Court of Chancery

I concur in all of Mr Harington's specific recommendations

I think that two Benches, each of two temporary Judges, should immediately devote themselves to clearing off the arrears If our Government in India be good for anything, it ought not to lose a moment in abating so abundant a source of demoralization This will involve the appointment of two more temporary Judges

I think also that a fourth permanent Judge should be nominated, in order that the services of the three existing permanent Judges may be properly utilized Mr. Harington's observations on this point seem to me conclusive

It will be well that the Lieutenant-Governor be moved to cause the Lower Courts to confine themselves to the spirit of the Code of Civil Procedure in respect of the hearing of original suits I do not, as will be hereafter seen, think the present distribution of Courts of Appeal and of First Instance a good one, but the system will not be improved by irregular departures from it

I further concur with Mr Harington in thinking that, in the face of remonstrances from so many Courts of Appeal, we cannot carry out the recommendation of the Secretary of State as to the disposing of applications for special appeals by a single Judge It strikes me, too, that the suggestion is made in ignorance of the great change which has recently taken place in the value attached to isolated judicial rulings, since the establishment of the High Courts and the introduction of a better (though still imperfect) system of reporting

When this reference goes ultimately to the Financial Department, it is impossible that the largeness of the outlay demanded should not be animadverted upon I am bound to say that it is not the last claim for additional expenditure on Courts of Appeal and Revision which is destined to come before the Government The Lieutenant-Governor of the Punjab has made an application for a second Judicial Commissioner, and the criticisms on his proposal which have been received would appear to prove that, not only a second, but a third Commissioner is required As the increase of litigation is proportionate to wealth, and as the province of Oudh is one of the most rapidly advancing portions of British India, the time cannot be far distant when the highest Appeal Court of Oudh will require strengthening.

What I look forward to in these provinces, if no change takes place in the Indian judicial system, is a series of augmentations in the fixed strength of the Courts, combined with a series of spasmodic efforts to clear off arrears by the aid of temporary Judges There is a chronic tendency towards arrears in the Indian Courts of Appeal, from causes which I will presently attempt to describe, and if this tendency is less likely to show itself hereafter in the High Court of Bengal than in other Indian tribunals, it is because those causes are combated so far as the power of the Court extends, by remedies which, though necessarily inadequate, are yet applied on proper principles

On the other hand, I am convinced that, if the Indian judicial system were placed on a proper footing, one High Court or Sudder Court would serve for the whole of the North-West, Punjab and Oudh, and might exercise a much more effectual and much less teasing and irritating superintendence than that which is now exercised by the three existing Courts of Appeal

I am bound to give my reasons for this opinion, which reasons are not, as it appears to me, of a kind to be invalidated by my comparative ignorance of the country I am especially anxious to state that I do not contemplate on the one hand the coarse expedient of merely lopping off an appeal here and there, nor on the other hand a mere revision of establishments—that is, a shifting and exchanging of the elements of which the system is now composed, without alteration of principle.

To anybody who is accustomed to the criticism of judicial systems, it becomes evident on very short examination that the Indian system is founded on the assumption of the comparative incompetence of the Judge of First Instance Every Judge in his degree has somebody placed above him, and sometimes a series of persons, whose office it is to correct his supposed mistakes

So far as this assumption relates to questions of law, it cannot be called untrue, though it may, in some cases, be incidentally false Every judicial system ought to be so arranged that each Judge should be more competent to decide questions of law than the Judge below him, and I am not in a position to say that the Indian system is not so arranged I have, therefore, no quarrel whatever with the form of appeal known as a special appeal But, so far as the assumption relates to questions of *fact*, I hold it to be a delusion, and based on a false theory of the means of ascertaining truth

I do not believe that any Judge, of whatever power, patience and ingenuity, can, when sitting in appeal, and removed from actual contact with the witnesses, successfully correct the mistakes of a Judge of First Instance, unless to a very slight degree Except in physical science, there is no known measure of the truth of facts except the aggregate of the impressions made on the minds of men of average capacity and integrity by the

evidence concerning those facts, and of these impressions the most important part is produced by the language and demeanour of the witnesses and by the characteristics of their story, not as it is read on paper, but as it falls from their lips It follows that a Judge of moderate abilities, who is actually in contact with the witnesses, has a far better chance of arriving at truth than a Judge of much higher power who hears the evidence at second hand, even when that evidence is completely taken on paper But when, as is, I fear, too often the case in India, the evidence, so far from being completely reported, is taken down with utter carelessness and unintelligence, not only is the Judge of Appeal in no better position for ascertaining truth than the Judge of First Instance, but his chances of reaching it are far worse I am quite well aware that many able men in India think that ingenuity and subtlety in the Judge of Appeal will enable him to draw from imperfectly reported evidence conclusions sounder than the rough impressions of the Native Judge below I do not question the sincerity of their belief, but I consider that the theory arrived at under such circumstances concerning the facts is in most cases a mere figment of the mind, and that the chances of error, so far from being diminished, are increased in proportion to the ingenuity of the Court of Appeal I do not say that the incompetent Judge of First Instance is not often in the wrong, but I say that we have no security that the Judge of Appeal is in the right The first can only err (if we put bad faith aside) from making an ignorant or careless use of real materials, but the errors of the second come from his being compelled to work upon materials which are only imaginary

However strange or novel these principles may appear in India, they are the foundation of the English system of deciding questions of fact In the English Courts whose business it is to decide such questions, there is no such thing as a true appeal from the decision of a Judge of First Instance on facts The finding of a County Court Judge on facts is always taken as conclusive even when the soundness of his decision on a point of law is in question, and, though the verdict of a jury may sometimes be disturbed, the Court of Law never propounds its own view of the facts, but refers the case to a second jury Indeed, it is only once among a thousand cases that a verdict is set aside as against the weight of evidence, the common cause of disturbing verdicts is some error of law by the Judge who directs the jury.

The doctrine that there is no patent machinery, consisting of rules to guide the mind, by which truth can be extracted from paper evidence, is one of the few contributions which scientific jurisprudence owes to English lawyers Such rules form a large chapter in most continental systems of law, but the English Law of Evidence, which assumes the existence of a Judge and jury sitting together, has quite a different character This part of

English law (the Law of Evidence) is most useful to a Judge of First Instance, but it has no application at all, or only the very smallest, to a Court of Appeal I perceive with regret, that many Indian Judges of Appeal have formed a wholly erroneous notion of the functions and limits of the English Law of Evidence. The results of their attempting to apply it *in alienâ materiâ* can only be to create confusion worse confounded

To show that these are not merely speculative theories I will take the liberty of stating how I have seen them tested In the English Court of Chancery, partly from its having inherited some false principles from Roman law, but chiefly through the anxiety of the Court to save the suitors from expense, an equity Judge, instead of sending a complicated question of fact to a Common Law Court to have it solved by a jury, will sometimes undertake to decide it himself I have rarely known a Judge to make the attempt without expressing distrust of his own judgment, and I have generally observed that the amount of distrust is in proportion to the ability of the Judge But it has once or twice happened within my knowledge that a Judge, after beginning the attempt and stating his impression of the facts, has finally abandoned the enquiry in despair and sent the case to a jury It has been the startling difference of the story as heard from the witnesses from the same story as told on paper, and the conviction forced upon me that the decision of the jury was right and the impressions of the Judge wrong, which have left me without the slightest doubt of the soundness of the principles set forth above

The practical conclusion which I draw from these principles is that all efforts at Indian law reform should be directed to one end—to the improvement of our Judges of First Instance Their character and capacity ought to be such that their judgments on questions of fact may be taken by all Courts above as conclusive But it would be a mistake to suppose that I point at a very high standard Moderate ability would suffice, so far as Judges of First Instance are required to decide on questions of fact, but good sense, good faith and familiarity with the usages of the people are indispensable.

Such a course of law reform would carry with it the rare combination of diminished expenditure with closer adjustment to principle So that our efforts and those of the Local Councils and Governments take that direction, I am almost indifferent as to the specific scheme which may command favour But I think I am bound to say something of two proposals which resemble one another in raising the questions which I have been considering

One is the proposal referred to in Mr Harington's Note for the constitution of Provincial or Divisional Courts, whose decisions, though subject to appeal on points of law, should be conclusive on questions of fact This plan has the authority of Sir

Barnes Peacock and Mr Harington, and the mention of the Chief Justice's name gives me the opportunity of stating that Sir Barnes Peacock, as I gather from conversations with him, entirely concurs with me on the question of principles just discussed Nothing can be sounder than the principle on which the scheme of Provincial Courts is based, and it would be a radical remedy for the evils of the Indian judicial system But then it has the inconveniences of all radical remedies It would revolutionize all existing arrangements, it would disturb all existing interests, it would raise some very troublesome questions regarding the privileges of the Civil Service, and at first, though certainly not in the long run, it would be very expensive

Further than this, I must own that I hesitate to express an opinion in favour of any comprehensive scheme of Indian law reform, so long as the petty and the great litigation are disposed of by the same machinery No one can quite say what may be the exact consequence of attempting to mend an engine which has so much work to do It is well known to English lawyers that law reform was impracticable at home until the County Courts were established, but, as soon as the Courts at Westminster were lightened of the burden of petty cases, their faults of constitution and procedure became visible, and the results of altering them could be foreseen Then, and not till then, the Common Law Procedure Acts were passed India is now in the condition from which England has been delivered, and remains the sole example in the world (so far as my knowledge extends) of a country pretending to a civilized judicial system, in which the great and small litigation are dealt with by the same judicial machinery The only apology I ever heard for this anomaly consisted in the observation that the poor man's cases are as valuable to the poor man as the rich man's cases to the rich man, and that both are entitled to the same securities for justice I trust I may be pardoned for comparing this argument to the ironical reasoning of the English Judge who defended the former English system of divorce by Act of Parliament on the plea that the law of England knew no distinctions between rich and poor The truth is, that the faults of the existing Indian system fall with infinitely greater weight on the poor man than on the rich From the smallness of the sums which he generally has at stake in his cases, the poor man is restricted to the lowest stages of the judicial hierarchy He is confined to the lowest (and therefore the most incompetent) Judge of First Instance, and to the lowest (and therefore the most incompetent) Judge of Appeal He is only brought into contact with those parts of our judicial system of which it is too often true that the blind sit in appeal from the blind

These remarks bring me to the second of those plans which, in my eyes, have at least the merit of being adjusted to true

principles—the scheme for the extension of Small Cause Courts. I do not in the least wish to anticipate a discussion which may be more usefully taken up hereafter and elsewhere, but such grave misapprehensions are abroad, that I venture to point out very briefly the bearing of the arguments which I have submitted on the question of the establishment of Small Cause Courts

The essentials in the constitution of a properly organized Small Cause Court are these—

1st—The comparative superiority of the Judge

2nd—The limitation of the jurisdiction to a certain class of cases

3rd—The limitation of the jurisdiction to cases below a certain amount

Of these three ingredients the first two are incomparably the most important The effect of that characteristic of a Small Cause Court which I have placed second in order—the limitation of the jurisdiction to cases *belonging to certain specified classes*—is that Small Cause Courts are pre-eminently Courts for the trial of facts I refer to section 3 of Act XLII of 1860 and section 8 of the Bill for the Improvement of Civil Justice in Suits of Small Value, and beg to observe that it is only in rare instances that cases belonging to the classes there indicated involve questions of law When they do involve them, the questions are usually of the simplest kind

When it is once seen that a Small Cause Court is mainly a Court of Fact, and when the superiority of the Judge, the characteristic which I have placed first, is taken into account, I trust it is immediately perceived that the reason for giving no appeal from the Judge of a Small Cause Court is not the mere wish to get rid of the appeal The appeal is discarded because it is not wanted, because it would create injustice and not justice, because it would do harm and not good

It is true—though much less true of the Mofussil than of England and the presidency-towns—that it is sometimes not possible perfectly to eliminate law from fact The cases to which the jurisdiction of Small Cause Courts is limited may occasionally involve questions of law, and hence it is necessary that a Small Cause Court Judge should have had a legal training Otherwise, any man of good sense, good faith and familiarity with the usages of the people would serve

The element of a Small Cause Court which I placed last in order—the limitation of the jurisdiction to suits below a certain value—is popularly considered the most important of all It is, in fact, the least important It is supposed to be designed for the sake of limiting the area of possible injustice Injustice may occasionally be done by Small Cause Courts as by other Courts, but I do not hesitate to say that the limitation of the jurisdiction to a small amount is chiefly a concession to popular distrust of a new system It is invariably found that, when a

County Court or Small Cause Court has been organised on proper principles and established in a particular locality, a feeling grows up in favour of increasing the amount of its jurisdiction

The only further remark I have to offer at present is that, although I hold the Indian system of appeal on facts to be founded mainly on a delusion, I admit it to be important that the delusive nature of the system is not recognized generally in India Though it may not be possible to correct the blunders of a Moonsiff, the Moonsiff himself thinks that it is possible, and thus may, to some extent, be less open to corruption, and a shade more careful in his adjudication and in his collection of the evidence So long as our Judges of First Instance are what they are at present, I would never relieve their decisions on facts from appeal without substituting for the system of appeals a system of rigid supervision

(*See No 27*)

No 21

ACT XIII OF 1859, APPLICATION OF ENACTMENTS TO FOREIGN TERRITORY

(*5th March, 1864*)

Proceedings, Foreign Department, Judicial, A March, 1864, Nos 32 34

I HAVE marked on the margin of Mr Harington's note the points on which I entirely concur with him

I agree further in his practical conclusion, but not wholly on the same grounds * * * * * * Now, nothing can be more certain than that civil and criminal process will not run *proprio vigore* in foreign territory At the same time, under what is called the comity of nations, foreign States execute the civil process of friendly nations to a great extent as a matter of course, and, though a treaty of extradition is generally required for the execution of criminal process, the principle applied is the same It would of course be absurd to suppose that, considering the relation of Mysore to British India, this comity or courtesy does not exist Civil process should be executed at once, but, as regards warrants, I think matters would be more regular if an order of the Governor General in Council directed the British functionaries in Mysore to execute them when issued in British India.

I find it difficult to persuade myself that the extension of the Code of Criminal Procedure to Mysore brings that State for all purposes within the system of British Indian criminal law What seems to me to have happened is that Mysore and British India * * * * have accidentally the same criminal jurisprudence I would suggest

that the " extension " of Acts to Mysore is a misleading expression, for extension has a peculiar meaning under our system. " Application " strikes me as a better word

It seems to me that when Sir C Trevelyan extended Act XIII of 1859 to the whole Madras Presidency he can hardly have contemplated all the consequences of his measure I had myself occasion to consider that Act carefully when the Penal Contract Bill was under discussion, and I was clearly of opinion that such agricultural contracts as we have in Bengal, *i e*, contracts by a ryot to labour on land in his own occupation, were not within the Act But these Wynaad contracts have probably been made with men who labour on the planter's land The question whether such contracts are within the Act will depend on whether the labour contracted for is *ejusdem generis* with the sort of labour primarily contemplated by the Act, *i e*, the labour of workmen and artificers It is impossible to have a confident opinion without knowing the facts, and without, as Mr. Harington suggests, seeing the warrants I agree that the Madras Government should be addressed

(*See Nos 39, 71 and 91*)

No. 22

KATTYWAR STATES, SOVEREIGNTY.

(22nd March, 1864)

Proceedings, Foreign Department, Political A, April, 1864, No 17

I CONCUR in the expediency of the arrangements proposed by the Governor General for the affairs of Kattywar, and it is possible that, if the legal basis on which His Excellency places his proposals were properly explained, I might not dissent from it But the proposition that territory which is British is not subject to British law does not appear to me to be tenable, and I am certainly of opinion that the Governor General's view is not reconcileable with the view of the Bombay Government. The members of that Government obviously mean to contend that Kattywar is British territory in the same sense in which the Konkan is, and, if so, I think that all the consequences which they contemplate would follow All laws and regulations which were of general application, and were passed by a competent Legislature, would extend to Kattywar, and a very difficult and complex enactment would be required to place the country under a system adapted to the state of society which prevails in it The Foreign Secretary has, it is true, called attention to a provision of the Bombay Regulations which attempts to enact that no territory shall be made subject to the Regulations except by specific Regulations I do not doubt that this provision was intended to have the effect

attributed to it by Colonel Durand, but I consider that it was beyond the powers of the enacting authority No Indian Legislature as constituted in 1827 could shackle the action of the same Indian Legislature as constituted in 1828 Impediments to the exercise of the full powers of legislation at any given moment can only be created by some superior Legislature

I am quite conscious of the difficulty of applying international rules and international conceptions in India, but, if that difficulty must be faced, my opinion is, that the Kattywar States are in the enjoyment of some measure (although a very limited measure) of sovereignty, and that therefore the territory which they include is properly styled foreign territory The arguments of the Bombay Government—and, if I may venture to say so, of Mr Ritchie—seem to me to be vitiated by an imperfect appreciation of the rule laid down by the publicists that the question of sovereignty is, for purposes of international law, pre-eminently a question of fact It is not enough that a claim to political supremacy might have been asserted, in order that the law of nations may apply, it is necessary that the claim should have been in fact asserted If this were not so, international law would have to take notice of such pretensions as that of former Kings of England to be Kings of France, or of the former Kings of the two Sicilies to be Kings of Cyprus and Jerusalem Whether the Peishwa or the Gaekwar had really any authority over Kattywar of such a sort that it was capable of descending to any other Power is a point on which I do not think it necessary to enter, because, whatever were the rights which were inherited by the British Government, those rights have never been actively asserted On the contrary, it appears to me that they have been distinctly disclaimed Not only has our whole course of action in Kattywar been inconsistent with a claim to absolute sovereignty, but the Court of Directors made a declaration in 1830 which appears to me to have conclusively disposed of any such claim The Court of Directors was perfectly competent to disclaim sovereignty over Kattywar, and it did disclaim it Sovereignty being a question of fact, this declaration, being an admission against the interest of the declaring party, is evidence virtually irresistible Nor do I think that this declaration can be recalled by any existing authority, whether it be the Government of India or the Secretary of State in Council On the assumption that international rules in some sense or other apply to the case, it is not competent to a State after admitting by an organ capable of representing it that a neighbour is sovereign, to turn round suddenly and allege that the admission was all a mistake It is conclusively bound by its declaration until a new state of things arises through war or treaty

But, although these seem to me to be the principles which apply to the relations between Kattywar and the British Gov-

ernment, it does not at all follow that the Government of India is precluded from carrying out in Kattywar the arrangements suggested by the Governor General I quite agree with Mr Harington that the analogy which governs the case is that of the old demi-sovereign States in Europe, and I think that a portion of sovereignty over Kattywar, sufficient to warrant us in interfering for the good order of society and the well-being of the people, is lodged with the British Government

Sovereignty is a term which, in international law, indicates a well ascertained assemblage of separate powers or privileges The rights which form part of the aggregate are specifically named by the publicists who distinguish them as the right to make war and peace, the right to administer civil and criminal justice, the right to legislate, and so forth A sovereign who possesses the whole of this aggregate of rights is called an *independent* sovereign, but there is not, nor has there ever been, anything in international law to prevent some of those rights being lodged with one possessor and some with another Sovereignty has always been regarded as divisible Part of the sovereignty over those demi-sovereign States in Germany which were put an end to by the Confederation of the Rhine resided with the Emperor of Germany, part belonged to the States themselves So also a portion of the sovereignty over the States which make up the present German Confederation belongs to that Confederation Again, the relation of the Swiss Cantons to the Federal Power was, until the events of 1847 and 1848, a relation of imperfect sovereignty, and, though at this moment it is dangerous to speak of the North American States, the relation of the several members of the Union to the Federal authority was, until recently, supposed to be of the same nature In point of fact, Europe was at one time full of imperfectly-sovereign States, although the current of events has for centuries set towards their aggregation into large independent monarchies It may be further mentioned that, down to the dissolution of the German Empire, the Emperor of Germany claimed theoretically to be sole, absolute or (as it would now be called) independent sovereign in Europe

It may perhaps be worth observing that according to the more precise language of modern publicists, "sovereignty" is divisible, but "independence" is not Although the expression "partial independence" may be popularly used, it is technically incorrect. Accordingly there may be found in India every shade and variety of sovereignty, but there is only one independent sovereign, the British Government My reason for offering a remark which may perhaps appear pedantic is that the Indian Government seems to me to have occasionally exposed itself to misconstruction by admitting or denying the independence of particular States, when in fact it meant to speak of their sovereignty

The mode or degree in which sovereignty is distributed between the British Government and any given Native State is always a question of fact, which has to be separately decided in each case, and to which no general rules apply In the more considerable instances, there is always some treaty, engagement or sunnud to guide us to a conclusion, and then the only question which remains is, what has become of the sovereign rights which are *not* mentioned in the convention? Did the British Government reserve them to itself, or did it intend to leave the Native power in the enjoyment of them? In the case of Kattywar the few ambiguous documents which bear on the matter seem to me to point to no certain result, and I consider that the distribution of the sovereignty can only be collected from the *de facto* relations of these States with the British Government—from the course of action which has been followed by this Government towards them Though we have to interpret this evidence ourselves, it is in itself perfectly legitimate

It appears to me, therefore, that the Kattywar States have been permitted to enjoy several sovereign rights, of which the principal—and it is a well-known right of sovereignty—is immunity from foreign laws Their chiefs have also been allowed to exercise (within limits) civil and criminal jurisdiction, and several of them have been in the exercise of a very marked (though minor) sovereign right—the right to coin money But far the largest part of the sovereignty has obviously resided in practice with the British Government, and among the rights which it has exercised appears to me to be an almost unlimited right of interference for the better order of the States I mean that, if the interferences which have already taken place be referred to principles, those principles would justify any amount of interposition, so long as we interpose in good faith for the advantage of the chiefs and people of Kattywar, and so long as we do not disturb the only unqualified sovereign right which these States appear to possess—the right to immunity from foreign laws

I think, therefore, that the actual state of the sovereignty over Kattywar affords a legal basis for the Governor General's plan But, even if I were compelled to admit that the Kattywar States are entitled to a larger measure of sovereignty, I should still be prepared to maintain that the Government of India would be justified in interfering to the extent contemplated by the Governor General There does not seem to me to be the smallest doubt that, if a group of little independent States in the middle of Europe were hastening to utter anarchy as these Kattywar States are hastening, the greater Powers would never hesitate to interfere for their settlement and pacification in spite of their theoretical independence. If anybody objected to the proceeding, it would be because some motive of self-aggrandizement was suspected But the motives of the Government of

India in effecting an arrangement of the affairs of Kattywar are above suspicion, and the course which it is proposed that we should take has its justification not only in the indefinite obligations contracted by us in the capacity of Paramount Power but in the fact, adverted to by Colonel Durand, that our government of India has, in a sense, been the cause of this anarchy in Kattywar One of the many difficulties attending the application of international law in India arises from the circumstance that the whole system of the law of nations was framed by its authors subject to the contingency of occasional war The British Government has prevented the Kattywar States from going to war among themselves, and hence has arrested the operation of a natural process by which the endless subdivision of the chiefships, occasioned by the law of succession, would have been corrected or counteracted

It is conceded on all hands that Bhownuggur is British territory Legislation will therefore be needed in all probability to bring it under a system in any degree resembling that adopted for the foreign States in Kattywar

(*See Nos 24, 68 and 72*)

No. 23.

PUNJAB FRONTIER

(*26th March, 1864*)

Proceedings, Foreign Department, Political, A, May, 1865, No 109

I DO not presume to differ from the Governor General and Sir R. Napier as to the proper mode in which the duties of the officer charged with the superintendence of the trans-Indus frontier should be discharged, or as to the amount of labour required for the discharge of those duties But the question of separating the frontier country from the rest of the Punjab has a side which has not yet been discussed I will advert to it briefly, as I acknowledge that these papers do not bring it up in the best possible form

The Lieutenant-Governor of the Punjab, in the words of his Secretary, does not trust for the improvement of this tract to its greater seclusion, but to its gradual assimilation to the remainder of British territory. It is, however, possible that a process which may have the effect of advancing the trans-Indus territory may also have the effect of retarding the rest of the Punjab. The peculiar system of the Punjab, the accumulation of diverse functions—political, fiscal, administrative and judicial—in the same hands, is, no doubt, excellently adapted for countries which are just settling down from the anarchy of native government, but it is most unjust to retain such a system after it has ceased to be necessary, and to sacrifice all other considerations

to the transient need of concentrated authority It is obvious that very different qualities are required for the discharge of judicial and other purely civil functions from those which contribute to produce effectiveness in political and semi military administration

It seems to me that by looking at the existing territory of the Punjab as a whole—by lumping together, so to speak, the trans-Indus country with the territories on this side the river—we bring ourselves to regard the greatest part of the Punjab as much more backward than it really is. The fallacy is that of taking an average when there is really little in common between the things compared Another effect, too, which I should expect from combining under the same system tracts of country so different is that a particular kind of qualification in the officers of the Punjab (a qualification in itself of the utmost importance) would have more value attached to it than the circumstances of the cis-Indus territory demand Every officer of the Punjab may be called upon at some period of his career to serve across the Indus, and it is but natural that the striking qualities required for such service would to some extent take precedence of others I am not entirely without grounds of fact to support this suspicion, for I cannot forget the tone of some papers which I saw at Simla—containing, I rather think, the opinions of certain Punjab officers on tehsil boards—or the protest of one gentleman that he and his colleagues were 'born for nobler duties" than the interpretation of Procedure Codes The Punjab Government is no doubt aware of what is its weak side, and has provided for the orderly administration of civil justice by the establishment of Small Cause Courts which are among the best in India But there will be no real security for the prompt and accurate discharge of judicial duties until the special qualities and special knowledge required for those duties are recognized by appointing separate officers to perform them in all the higher grades

Another desirable change which is greatly retarded by the union of the trans-Indus and cis-Indus tracts under the same system is the transfer of the Punjab to the Home Department In spite of all that has been done by the present Foreign Secretary to bring the business of his Department under the operation of fixed rules and principles, it still is, and probably always must be, but ill-suited for the supervision of regular administrations Its proper concern is not administration, but diplomacy, and often diplomacy of the most intricate and difficult kind Now and then, no doubt, a Secretary can be found who is equal to supervising both branches of departmental business, but the combination is necessarily rare There are always territories which must, of course, be under the Foreign Office, but only because, in a certain stage of certain parts of India, diplomatic or (as they are here called) political considerations are inextri-

cably connected with questions of administration But here, again, injustice may be done by unduly prolonging a state of transition

I do not wish at present to press my view of these questions, but, as regards the minor point which is for decision, I greatly prefer that the Lieutenant-Governor should at once delegate an officer to relieve the Commissioner of Peshawur from sessions cases and appeals Conversely, I agree with the Commissioner that there is absurdity in the Court of Appeal at Lahore releasing upon paper evidence a man who has taken part in a border foray I do not know enough of the legal constitution and legal basis of the Punjab Commission to be able to say whether these appeals can be disposed of in a different way without legislation

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No 24.

KATTYWAR STATES, CENTRAL PROVINCES CHIEFS, SOVEREIGNTY

(11th May, 1864)

IT is evident that the Chief Commissioner, while framing this extremely able report, has not had distinctly before him those legal difficulties which were so much discussed in the Government when we were considering the affairs of Kattywar As Mr Harington has remarked, the language of the report is somewhat ambiguous, nor is that to be wondered at under the circumstances Mr Temple more than once designates all these chiefs British subjects, and the people under them British subjects (with the exception perhaps of the Rajah of Buktar), but, on the other hand some of his expressions seem to imply that the chiefs exercise rights of sovereignty over their clansmen, and certainly his proposals as to adoption and succession are only admissible on the assumption that the chiefs are in some sense sovereign

Proceedings, Foreign Department, Political, June, 1864, Nos 14 16

I would suggest that the papers be returned to Mr Temple, with a request that he will classify the chiefs according to the principle of sovereignty or no sovereignty This might perhaps be done here to a certain extent from the material with which he has supplied us, but it will be much safer, and will contribute, I think, to ultimate despatch, if Mr Temple is left to effect the classification, making use for the purpose, it may be, of other materials which from his present point of view he has not deemed to be important

It should be distinctly explained to the Chief Commissioner that, if the chiefs are only British subjects enjoying a permissive authority over British subjects, the Executive Government has

no power to regulate their position It may of course exercise such powers as the law has conferred on it, by investing the chiefs with certain definite functions, but it can give them no power or privilege unknown to the law As to the succession to their estates and their enjoyment of the right of adoption, these questions must be determined either by the custom of the family (if there be an ascertainable custom) or by the general law of the country applicable to persons of their religion

Even if certain of these chiefs should be determined to be British subjects and nothing but British subjects, I by no means think it possible to adapt existing laws to their situation Mr Temple's remarks on the administration of justice by such persons under the various Indian Codes are excellent They show that he sees through the fallacy of the objection that certain parts of the country are not fit for the Codes Such an objection in truth implies that the Codes are always acted up to in our more civilized provinces But we have only too much reason to think that this is not so It is only a matter of degree. A chief, such as Mr Temple describes, will of course not come up to the mark of the High Court, but he will do better than if he had no guide at all, and much may be done to assist him by an expedient resorted to (I believe) by the late Judicial Commissioner of the Central Provinces, by supplying the chiefs with a popular explanation of the principles involved in the Codes The essential thing is not to expect perfection, or anything like perfection, but to take care that no principles except those of the Codes are recognized.

On the other hand, if the Chief Commissioner determines any of the chiefs to be in the enjoyment of some small degree of sovereignty, it is probable that most of Mr Temple's recommendations can be carried out with reference to such chiefs through the Executive Government The exact amount of interference permissible will depend on the facts of each case If, in fact, we have been in the habit of interfering either for the welfare of the chief or the well-being of the people, or for our own safety, or upon any other principle, we are entitled to continue that interference Nor is there any doubt that we can regulate the right of succession to a quasi-sovereign chiefship A sunnud clearly describing to such a chief his relation to the British Government will be in the highest degree convenient

It may save time if a copy of the minutes on Kattywar are sent demi-officially to Mr Temple If the notes written on the present subject are also sent, I should wish to remark that Mr Harington's language in one passage of his last note should, I think, be received with some reserve My honourable colleague, while expressing an opinion that some of the Central Provinces chiefs will probably be found to enjoy certain rights of sovereignty, observed that in such case he does not see what right we have to interfere, except as the Paramount Power to maintain the general peace of the country Now, of course, in particular

cases the maintenance of the general peace *may* be the sole ground on which we have a right of interference But it does not follow that there may not be a right of interference with dependent quasi-sovereign chieftains on other and lighter grounds The degree in which the absolute sovereignty is apportioned between the British Government and such chiefs is, in short, entirely a question of fact, and the fact when ascertained will determine the conditions under which the right of interference arises

In leaving this part of the subject I will merely remark that there is no impropriety in calling the subjects of a dependent quasi-sovereign chief subjects also of our Government, provided only that the word "subject" is not used, as Mr. Temple seems to use it in his report, with the intention of excluding any intermediate sovereignty "Subjects" is merely a term "correlative" to "sovereign," *i e*, exactly corresponding to it and measured by it. When, therefore, sovereignty is distributed between the British Government and a chief, the clansmen are subjects both of the Queen and of such chief—subjects, that is, to the exact extent to which sovereignty is exercised over them by either Power

Besides chiefs who can only be treated as ordinary British subjects and chiefs who have some degree of sovereign power, there may be an intermediate class—chiefs who are only British subjects, but whom justice and policy require to be entrusted with a jurisdiction resembling that of a quasi-sovereign chieftain The cases of such chiefs must be provided for by special legislation, but I earnestly hope that the class will be found to be extremely small or (what would be better) that it will be quite eliminated Some of the difficulties attending this sort of legislation I have adverted to in the minute which I submitted to the Government on Kattywar affairs, but many others suggest themselves on further reflection I may say at once that I have great doubts of the competence of the Council of the Governor General for making Laws and Regulations to create or continue in any subject what I may call for simplicity's sake a patriarchal jurisdiction Such a jurisdiction involves, not only judicial or administrative, but *legislative* powers, since the chief entrusted with it can change the principles of his decisions and administrative measures at pleasure Now, the Indian Legislature is only a deputed Legislature, holding, by delegation from the British Parliament, powers which are circumscribed by a Statute Its position seems to me to be one to which the maxim "*delegatus non potest delegare*" clearly applies, and with good reason, for the British Legislature obviously conferred these powers on the Council to be used, and not to be transferred to any other body or person

It may be a question hereafter whether any sunnud should be issued to chiefs who are determined to be merely British

subjects Such a sunnud must only describe to them their true legal position, but it may nevertheless give them a false general impression of their rights I am inclined, however, to think that the political advantage of relieving the chief's mind by such a sunnud outweighs other considerations

(*See Nos 22, 68 and 72*)

No 25

INDIGO-PLANTING, ACT X OF 1859, PERMANENT SETTLEMENT

(*20th May, 1864*)

Proceedings, Home Department, Judicial, June, 1864, Nos 36-46

I CONCUR with the Governor General in thinking that these papers disclose an unhealthy state of relations between the Bengal Indigo Company and the ryots on one of its estates, but I am very far from considering that all the allegations concerning the conduct of the Company which the papers contain are made out by anything resembling proof

2 The language of the letter from the Bengal Government which initiated the enquiry seems to me extremely unfortunate It is to be remarked that, in the present case, the facts primarily established were the reverse of those which we are accustomed to hear of In this instance, some villagers had made a homicidal and *primâ facie* unprovoked attack on the servants of a factory Surely the obvious course, under such circumstances, was to direct a searching enquiry into the facts in such language as would secure its completeness and impartiality But, though the Lieutenant-Governor probably did not intend it, his Under-Secretary, writing on 3rd March, 1864, certainly used expressions which look very like a broad hint to the Magistrate of Nuddea to find some excuse for the outrage which had been committed It was an additional misfortune that the subordinate officer who had to conduct the enquiry was Mr —— As I shall state presently, I by no means believe that all the allegations put forward by Mr —— are either disproved or not proved, but I must say that his letter has almost every characteristic which should *not* distinguish a judicial document, or indeed any document which is to guide subsequent action It insinuates where it does not affect to assert, it puts forward hearsay as proof, it deals in irony and sarcasm, and it is pervaded throughout by the strongest *animus* I cannot agree with His Excellency that these characteristics of the letter are excused by its being confidential Surely confidential letters, to have any value, must conform to the ordinary canons of truth—that is, they must be the products of a tolerably impartial mind.

3. I am compelled to speak strongly of the tone of Mr ——'s letter, because it destroys our best means of ascertaining the cause and origin of the affray I would at all times greatly prefer trusting the impressions of an officer who conducted an enquiry on the spot to forming any conclusions of my own on paper evidence But, of course, the peculiar value of local investigation disappears when there are signs that the enquirer was under the influence of a preconceived opinion My own impression, however, is the same as that of His Excellency and of my colleague Mr Grey, that the coolies of the factory were committing a trespass on the lands of the village Whether they did so knowingly does not appear to me to be shown, nor can I agree that more than a bare possibility is established that the affray was connected with previous grudges on the part of the villagers arising out of indigo contracts It is a very obvious suggestion that the attack was prompted by sudden rage at the intrusion So long as there are people in England who would quarrel with their dearest friends for trespassing on their lands, I really cannot see why we should look for remote or secondary motives when the inhabitants of an Indian village, to whom their land is everything, attack the servants of a powerful neighbour and begin openly to plough it up

4 Some of Mr ——'s allegations are sustained by Mr Dampier, and to that extent I accept them, for Mr Dampier's story, founded on the admissions of the Assistant Manager of the factory, is excellent evidence The facts established are such that the Government of India cannot withhold its attention from them, though, as they seem to me not to have any necessary connection with the affray, I do not think we can found any immediate action upon them

5 Nobody competent to entertain an opinion on the subject can doubt that there is great political evil in a system of compelling the execution of contracts by the fear of indefinite enhancement. The relation of landlord and tenant is everywhere a hard one, except where it is softened by traditional associations, or except where (as is the case in England, Scotland and a great part of Europe) the land is merely hired from the owner by a capitalist farmer as an auxiliary in the employment of his capital Differences of race must always add to the natural harshness of the relation, but the case in which I should conceive that it would gall most severely is where it is only colourably established, and where it is employed as a substitute for the compulsion which ought only to be applied by Courts of Justice on those principles of civil jurisprudence which, if fairly carried out, will assuredly, in the long run, bring about fair dealing between a class of contractors and a class of contractees

6 The greatness of the evil ought not, however, to make us unjust to individuals, and in this particular case I cannot really see that the agent of the factory can, on ordinary commercial

principles, be heavily blamed In the first place, he was only an agent, and therefore cannot have acted directly in his own interest, and for this reason alone I think that Mr —— 's sarcasms against the morality of companies are extremely out of place Even if the gentleman in question had had a direct pecuniary interest in the indigo, he could scarcely be charged with conscious unfairness Doubtless he only supposed that he was taking, in the form of an oppressive and one sided contract, the money which the law entitled him to take in the form of rent. The mischief of the course pursued was not likely to be palpable to an individual planter so long as he was confined to his own sphere though it might possibly be realized by a number of persons who had the advantage of bringing together the experience of many separate localities I think, accordingly, that the Lieutenant-Governor did quite rightly in addressing himself to the Landholders' Association, and indeed, except in a few particulars I think his letter admirable

7 It appears to me to be time that we averted our eyes from the supposed malpractices of individuals, and endeavoured to discover the source of that infirmity in the society of Bengal which from time to time, exhibits itself in these morbid symptoms These symptoms show themselves particularly in the relations of planters and ryots engaged in the cultivation of indigo, simply because that branch of industry has been afflicted longest with the malady I believe I am not mistaken in saying that indigo planting was one of the few occupations in which the East India Company, in old days, actively encouraged Europeans to employ themselves, and that the business grew up, not only with the connivance of the Government, but with its strong approbation Of course, it was not intended that Europeans should become landholders, and indeed the state of the law would, for long, have prevented it But it was meant that they should be contractors and that their contracts should be the same in form, though not in spirit, which they have always here been, —that is, that they should be founded on advances and should prescribe the details of cultivation But it was forgotten that a system of contracts without an apparatus of tolerable Civil Courts was, to use the gentlest word I can think of, an anomaly The result has been that, there being no Civil Court until recently in Bengal into which any man in his senses would take a small contract, the whole history of indigo-planting in Bengal has been the history of a succession of substitutes for regular tribunals The first substitute—a most natural, if an objectionable one—consisted in those private jurisdictions established by the planters in their factories of whose oppressions the Indigo Commission Report contain such amazing revelations The next substitute was the Penal Contract Law, which, after being temporarily in force, was at last conclusively put aside by the Home Government The last of these substitutes has been the system

of enhancing rents, and for encouraging this in its infancy some of the best-intentioned friends of the ryot are, it is well known, not wholly free from responsibility It appears to me that merely to strike out of the hands of the planters each of these weapons, as they are successively taken up, would be but poor statesmanship The only result of such a policy, if carried out by itself, would be the last launch of the alternative suggested by the Governor General, that is to say, indigo would cease to be cultivated Now, we should surely look facts in the face Is it not a fact that the total collapse of the great indigo interest would be, not simply a severe wound to the prosperity of India, but almost a fatal moral blow to the credit of the Indian Government?

8 The private jurisdictions of the planters, the Penal Contract Law and the enhancement of rents are all systems of enforcing contracts devised in the interest of plaintiffs They are calculated, not only to compel the execution of contracts but to compel the execution of unfair and one-sided contracts It is impossible not to see that the suspicion lingers in some minds that Civil Courts are, after all, only a plausible instrumentality for effecting the same object I will just test this view by reference to the contracts mentioned in these papers It is alleged that the Bengal Indigo Company induced the ryots to make contracts, lasting over twelve years, for the cultivation of indigo at unremunerative, prices, and that these contracts were substituted under the threat of collateral disadvantages for older engagements which were tolerably remunerative Now, the sources of invalidity which law recognizes in contracts are (to put a large subject in a small compass) mistake, fraud and duress Each of these terms is liberally interpreted, and the latter term is extended so as to include any moral coercion exercised by a person in a position of authority over one below him. It is dangerous to speak in general language, but my impression is that, if the above-mentioned contracts correspond with their description, every one of them would be liable to be set aside, and under the present Indian procedure the grounds of invalidity could be pleaded in the defence to a suit But, even if that were not strictly so, the practical result would be the same. Of decreeing specific performance on an unremunerative contract lasting over twelve years there could be no question, for specific performance is an equitable remedy. The plaintiff would be thrown back on his suit for damages, and the damages awarded, under all the circumstances stated in the papers, would be whatever corresponds in India to the English verdict of "damages, one farthing"

9 I am not speaking of principles which it requires profound legal knowledge to apply They belong to the alphabet of jurisprudence I could name several gentlemen of the

younger Civil Service, now officiating as Small Cause Court Judges, who could be trusted to apply them without a moment's hesitation But the Native Judges before whom these contracts now come in Bengal appear to fluctuate between an impression that every contract is absolutely and necessarily binding and an idea that any quirk of procedure may justifiably be resorted to for the purpose of defeating an engagement between a Native and a European

10 The Secretary proposes a law to declare all unremunerative contracts void *ab initio* This would be simply to re enact the doctrine of the general civil law in a highly inconvenient form and one which would give rise to endless litigation Wherever an unremunerative contract ought to be annulled, the elementary principles of law ensure its defeat

11 The proposition that Indian ryots will always perform remunerative contracts without compulsion, coupled with an inference that Courts are not needed, seems to me to be either a truism or to involve an assumption contrary to equity If it be only meant that there is some amount of money payment which will induce everybody, even a West Indian Negro, to work, of course the assertion is true, but no system of business relations founded on it could go on for a day On the other hand, if it be intended that a contract ought to remain profitable up to the last moment of performance, I do not think that equity requires any such condition If both parties are free agents and have a full knowledge of all surrounding circumstances, it is enough that the contract is fair and remunerative at the moment when it is made. Contractors, from fraud, caprice or idleness, may so alter their circumstances that it is no longer profitable to them to go on with their engagement In such cases Courts do and ought to intervene and compel performance, subject to the very moderate penalties which the law imposes on a breach of civil obligation

12 If even nothing more were done than to establish throughout the European districts in Bengal properly-organized Civil Courts, presided over by decently-qualified Judges and governed by the excellent Indian procedure, I have personally no doubt that a silent revolution would speedily accomplish itself, under which the character of the contracts between planter and ryot would be completely altered, and Europeans would be weaned from burdening themselves with acquisitions which I believe to be in themselves most distasteful to them—the proprietary interests which they now purchase in land But I quite agree that the power of indefinitely enhancing rents should be checked not simply because it enables Europeans to enforce inequitable contracts, but because it cannot be long confined to the comparatively limited area of the indigo districts, it must ultimately extend itself to the rest of Bengal and become an engine of frightful oppression in the hands of the Native zemindars

13 It is just possible that, if the Courts of Bengal follow the exposition of Sir Barnes Peacock's late decision, which he has himself submitted to us in his recent minute, we shall be saved from the necessity of legislating at all If, however, we have to legislate—and in certain contingencies I quite agree that we must legislate—I think it due to myself to point out the difficulty and delicacy of the task The unfortunate omission of the Local Government to carry out Mr Harington's Small Cause Court Act in the spirit in which it was framed, and thus to give effect to the manifest intention of the Home Government by imparting the utmost efficiency to civil justice *simultaneously* with the refusal of the Criminal Contract Law, has surrounded us with a host of embarrassments The opponents of the Penal Contract Law had, on their side, all the principles and maxims of civilized jurisprudence, and had nothing to contend against except the argument—never very convincing to our countrymen at home—that there is something in India which renders it an exception to the results of general experience In regard to the amendment of the Rent Law our position is exactly reversed All the ordinary economical maxims are adverse to interference between landlord and tenant; and in favour of regulating their relation by express law we have only to urge the peculiar and exceptional constitution of Indian society An additional difficulty is created by the circumstance that many, perhaps most, of the proprietary rights purchased by Europeans in the soil have been purchased since Act X of 1859 was passed, so that we have to meet the inevitable contention on their part that they have paid full value for their estates on the understanding that the Statute was to be maintained, and that they are entitled to the interpretation put upon it by the highest Court of Justice in the province

14 Such arguments are not unanswerable nor are the difficulties which they create insuperable But it is right that both sides of the question should be understood

15 The form which an enactment amending Act X should assume has yet to be settled It should be fully comprehended at starting that popular expressions, explanatory of the standard of rent payable by occupancy-ryots, such as those now famous words "fair and equitable," are for the future out of the question Such expressions, when submitted to technical tests, prove to mean anything or nothing *Primâ facie* much the most plausible proposal I have seen is one emanating from a distinguished revenue-authority that the occupancy-ryot should pay a certain percentage lower than the market-rate But it seems that many of the Bengal ryots are so greatly under-rented that no percentage, likely to be reasonable in the North-West, can be otherwise than injurious to them Accordingly, I have reason to believe that the same authority now proposes that the Local Government of each province should fix the percentage

of abatement to which the occupancy-ryot shall be entitled But such a proposal is condemned on the face of it. Nobody could raise his voice in open Council in favour of a provision that the Lieutenant-Governor of Bengal should be empowered to declare the income and selling price of every man's estate.

16 On the whole, I think that no scheme promises so well as that of a permanent sub-settlement I cannot agree with my honourable colleague Mr Grey in the objections to such a scheme which he derives from the engagements of the permanent settlement I do not profess to have gone so deeply into the matter as many persons in India, but, for my part, I never could understand the application to the permanent settlement of language which is only appropriate to a compact or treaty If the permanent settlement was a compact, it was *pactum sine causâ*, an engagement not made upon consideration, and entitled to be interpreted largely in favour of the party which gave everything and received nothing If there were any consideration, it consisted in the general prosperity expected from the measure, and, if part of this has not been realized, but on the contrary a formidable political and social evil has resulted to any class of the population, we are surely not estop ped by any principle of justice from abating the mischief None of the indefinite claims, based on the language of Lord Crownwallis's manifestoes, can be compared in sacredness to the vested rights of the English tithe-owners and lords of manors, and yet the English Legislature did not hesitate to force an arrangement between the farmer and the first, and the copyholder and the last And no sooner was the experiment begun than it proved to be popular with all parties.

No 26

Taxation of Subjects resident in Foreign Territory

(28th May, 1864.)

Proceedings, Financial Department, Separate Revenue (Stamps), November, 1864, Nos 430-439

It is within the legislative power of any State to extend its fiscal laws to its subjects though they are resident in foreign territory, provided only any means can be found for levying the impost. At the same time no fiscal law is taken to affect subjects resident abroad, unless the intention to bring them within its sweep is clearly disclosed No such intention appears in the Stamp Act, which must be considered limited primarily to British India Persons under English military law carry, however, their nationality with them wherever they go for military purposes and hence I agree with the Advocate General that stamps on documents filed in Military

Courts of Requests established in native territory are lawfully imposed.

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No. 27.

AGRA SUDDER COURT, HIGH COURTS, CIVIL JUSTICE.

(16th June, 1864)

Proceedings, Home Department, Judicial, 20th August, 1864, No 52.

MR Campbell's report on the Agra Sudder is very interesting and of no small value, but it touches on several matters on which there are really at present but scanty materials for forming a conclusion Some, too, of his recommendations are exclusively for the Local Government, and others are for the Secretary of State I ought to observe that the actual practical result of Mr Campbell's mission is best judged of by referring to the memoranda which he has appended to his report. They are in all respects excellent, and cannot but have had the most useful effect on the procedure of the Court.

I proceed to comment on such of the paragraphs of Mr Campbell's report as appear to call for remark —

Para 3—It is no wonder that any conceivable amount of arrears should accumulate under such a system The proper work of the Court was done by tired Judges, sitting in the afternoons of four days of the week, and never sitting together long enough to get accustomed to each other's mode of doing business

6—The whole benefit of hearing counsel was lost by this practice But how a Court, which is said to have laid such stress on procedure, can have allowed these irregularities among the vakeels, I am at a loss to conceive

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21—As I said before, I do not quite understand how a Court which followed so disorderly a system in its own audiences, should have attached such weight to correct procedure on the part of subordinate tribunals, for procedure is after all only orderly arrangement prescribed by rule Still Mr Campbell's observations go some way to relieve the Judges from the imputation of mere indolence, they do little, however, to clear them from the charge of mistakes of principle and of no small want of common sense

When a Court with heavy arrears pleads as its excuse the activity of its administrative supervision, it is a sufficient answer that the first duty of every tribunal is to its own suitors, and that the moral effect of rebukes by a Court which is in arrears itself can be but small.

Under such a system as was till recently pursued by the Agra Sudder, where no clear line was drawn between administrative and judicial business the inevitable result is that administration goes on at the expense of justice It is far more agreeable to convict others of not doing their work, or to teach them how to do it, than to do your own

Moreover, the chief end of a great part of Indian procedure is the proper submission of cases to the Courts of Appeal If the Courts of Appeal do not discharge their duty in an orderly and efficient manner, the end is sacrificed to the improvement of the means

The proper remedy is pointed out by Mr Campbell in paragraph 3 The limits of administrative and judicial labour ought to be distinctly traced One province should never be allowed to be confounded with, or encroach upon, another, and, should work fall behind in either of them, its arrears should be separately provided for The plan proposed by Mr Campbell seems unexceptionable

Something like the above remarks should, I think, be communicated to the Sudder through the Local Government.

I myself have, however, something more to say

I dislike extremely, and on principle, the discharge of the double duty of supervision through appeals and through circular, by the same functionary or body of functionaries Appeals are a species of supervision, and to my mind, when confined to questions of law and to proper cases, much the most important and effectual of all Circulars have not a fraction of the moral effect of adversely decided appeals, nor is there the same certainty that they have been maturely considered Moreover, I cannot see how they can be prevented from interfering with appeals, since questions which may afterwards come up judicially and on real facts must be often decided by anticipation extrajudicially and on a hypothetical state of circumstances.

The proper system seems to me to be that recommended by the Government of India in the case of Bengal, but rejected by the Secretary of State Supervision cannot be dispensed with in India, but it should be discharged by a Judicial Commissioner, associated with the Lieutenant-Governor and constituted his legal adviser I call him *Judicial* Commissioner, as that is an accustomed term, but in fact his office should not be judicial The Court of Appeal should be at liberty to act against his opinion, which, if he were properly selected, ought rarely to happen, if improperly chosen, he would be the more readily convicted of incapacity

Such a system would be closer to principle than that in existence, it would, I am sure, be more effectual, and it would cost the finances nothing, as one Judge, probably more, might be spared from each Sudder or High Court

I wish further to add that, while the indirect results of

supervision in a country like India are considerable, inasmuch as they keep the subordinate Judge to a sense of other eyes being upon him, their direct consequences are much less important than is usually supposed By supervision you can make a bad Native Judge observe procedure, as the Agra Sudder have done, but procedure is the mere outside of judicial machinery Knowledge of legal principle and of legal rules, and the power of applying them, are the really important portions of the process, and no superintendence, no rebukes, will drive these into a Judge without capacity or training. The true remedy I have so often dwelt upon that I will only mention it—the throwing a vastly greater proportion of the true judicial strength into the Courts of First Instance, so that much of the cumbrous and costly mechanism employed in superintendence and on appellate business may at once be spared

22 to 26 —These calculations are very curious, but of course only approximate, as the comparison of the business of Courts is often disturbed in an extraordinary way by successions of cases of unusual length and difficulty Of course, too, it is only in a very general way that one regular appeal can be taken as equal to six special appeals Still, I am unable to see how we can avoid placing Mr Campbell's results before the Secretary of State, with reference to their bearing on the High Courts of Madras and Bombay It is difficult to resist the conclusion that at Bombay, at all events, there are three, if not four, superfluous Judges The Bombay Court pressed lately for the appointment of an additional Barrister Judge The original jurisdiction at Bombay is likely to entail heavy work just at present, but, so long as more than one Barrister Judge was employed on the Appeal Side, the demand was quite indefensible

29 and 30 —All this is very true No Bengal Judge I have ever seen has failed to attribute the present position of that High Court, as a model Indian tribunal, to the influence of Sir B Peacock

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40 to 50 —These paragraphs raise a question which cannot be solved without more knowledge of Upper India than I possess It seems to me that facilities of communication have an important bearing on the question whether all the Bengal Provinces should have one High Court or more An Appellate Court should not depend wholly on papers, it should have the means of communicating, without excessive delay, with the Judges who tried the cause in First Instance, and even, if, necessary, with the parties or the witnesses

Mr Grey has called my attention to Mr Campbell's having omitted to take into account Scinde and the Central Provinces There can be no question that on any principle Scinde ought to go with the Punjab and the Central Provinces with the North-West, nor do I think that any representation could be made to

with those "specific rules" which His Excellency informs us he was at first inclined to lay down

2. The present Chief Commissioner of Oude, with whom I have some acquaintance, not only deserves the tribute which the Governor General has paid to his ability and energy, but it is only just to him to state that the views which he now maintains are the views which he has long maintained He is one of a minority (I believe rather a small minority) of North-Western officials who deny the soundness of that theory of Indian tenures and rights in the soil which I presume I may call the Thomason theory They have always contended that the principles on which the theory is founded have been assumed and not proved, and that the alleged facts which are supposed to bear out the theory are not really the result of observation, but are the fruit of the influence which the assumptions embodied in the "Instructions to Settlement-officers" have exerted in the minds of those functionaries My own impressions on such a subject are of course without value, but I think it must be conceded to this school of civilians that, while the weight of Indian authority is obviously and strongly against their views, there are really, on the other hand, no limits to the influence which preconceived opinion may exert on the mind, or to the degree in which facts may lend themselves in appearance to foregone impressions of their character

3 No quality is rarer or more useful in India than a healthy scepticism, and therefore, if Mr Wingfield, on assuming the Government of Oude, had given effect, not to his convictions, but to his doubts, and had induced the Supreme Government to direct a fair, free and unbiassed enquiry into the existence of hereditary tenants in Oude, I consider, not only that such an investigation would have been justifiable, but that its result would have been of the utmost political and social, and even of the utmost historical, value Oude was virtually a virgin field of enquiry, for all trace of the settlement effected on annexation had been swept away, and, so far as concerns any artificial interest in land created by English officials, the country was *tabula rasa* An attentive examination of the Oude tenures under these circumstances would have been of the utmost importance to us in the great controversies now impending, and we should have had a set of most significant facts to guide us instead of having to make our selection, as at present, between positive contradictory assertions My impressions, as I said before, are not worth much, but I confess I believe that the enquiry would have ended in establishing the existence of hereditary tenants but I cannot see that Mr Wingfield, on his own assumptions, need have been assured of this result It is quite conceivable, however improbable, that the evidence against the hereditary cultivators in Oude would have been so strong as to throw doubt on their original existence in the rest of India. Or, again, the tenures of Oude (and this I have seen asserted) might have been

The impression left on my mind by his language is that the question of actually vested right either never occurred to him or was wholly set aside His later declarations on the point, advanced long after his policy had been settled and after it had been partially carried out, can only, I think, be regarded as another illustration of the ductility of men's impressions of fact under the influence of a foregone conclusion

6 All evidence of the subordinate Oude officials unfavourable to the hereditary cultivators, which is subsequent to the date of the Record-of-rights, we are justified, I think, in regarding as vitiated in its source Any enquiry conducted under such instructions as are contained in the 31st paragraph must have been prosecuted under the strongest bias, and, indeed, the conclusive reason for believing that no investigation into the existence of these tenures has really taken place consists in the fact that the hands of the only persons who could have carried it out satisfactorily have been tied I do not understand that Mr Wingfield, even had his mind been free from bias, had any peculiar opportunity of investigating the question The very character of the eminent services which he has rendered in managing, educating and training to public functions and public spirit the new aristocracy created by Lord Canning would seem to show that his intercourse has chiefly been with persons who, even if they had not had a strong interest in denying the existence of these tenures, have probably very imperfect ideas as to the difference which in a settled society is recognised between might and right And the same observation applies to Mr Yule's testimony, which, however, I agree with the Governor General in considering quite as favourable as it is adverse to the hereditary cultivators But the position of the Settlement-officers is surely very different I speak with hesitation on such a subject, but, if I understand correctly the duties of a Settlement-officer, there is no testimony comparable with his on a question of ancient right. The elements of such a question, both in India and everywhere, are two-fold, first, the actual state of the enjoyment, past and present, and, secondly, the opinion of the people about it—of the "neighbours" as we should say in England, of the "villagers" in India When a Court of Justice enters in England on the investigation of an ancient right, the rules of evidence are, to a certain extent, relaxed for the purpose of letting in evidence of opinion, and I venture to describe the duty of the Judge and jurymen at such a trial as consisting in the effort to throw themselves into something like the position of an Indian Settlement-officer I would apply to them, but with far greater emphasis, the language I have so often used of the incomparable advantages enjoyed by Courts of First Instance, as distinguished from all other tribunals This priceless testimony has, however, as it seems to me, been sacrificed in Oude, it has been vitiated by the strong language of the Record-of-rights, and yet there

is just enough of it to lead us to suspect what result could have been arrived at if the enquiry had been unfettered.

7 These arguments will serve to show why I attach the utmost importance to the following passage from Mr Wingfield's letter to the Governor General of June 6th —

"I quite subscribe to the doctrine that the pledges given by Lord Canning and conveyed in the sunnuds will not be infringed by maintaining any existing rights It is on the existence of such rights on the part of non-proprietary cultivators that the issue turns This the talookdars, and I also, venture to deny, and I can assure Your Excellency that I have not come to this conclusion without much enquiry and reflection Perhaps, had I remained in the North-Western Provinces, I should never have arrived at it, but here I have been brought face to face with native society in its unadulterated state, and, with no other wish than to learn the truth, I have been unable to discover any trace of tenant-rights"

I entirely accept the issue as raised by the talookdars. The question is simply as to the existence of beneficial hereditary tenancies in Oude, but I wholly deny that their non-existence has been proved or even enquired into, and I think I have given reasons for not regarding Mr Wingfield's testimony as entitling us to dispense with independent evidence

8 The course, therefore, which I would recommend is simply to take issue with the talookdars on the question they have raised Let us for the first time have a full and free enquiry whether these rights exist I would strike out from the Record-of-rights, and from the instructions to Settlement-officers generally, so much as expresses any opinion of the existence or expediency of these rights, so much as appears to discourage their recognition, and so much as prohibits their being recorded No question of good faith with the talookdars is involved in such a course of proceeding, they do not urge that, if the hereditary tenants existed, we promised to abolish them, they merely assert their non-existence I would, therefore, take every pains to convince the talookdars that the enquiry is perfectly unbiassed, and I would avoid the smallest appearance of antecedently assuming the existence in Oude of beneficial occupancy

9 Whether these measures can be taken without legislation depends on the legal character of the Record-of-rights As His Excellency knows, a paper drawn by me has been submitted to the Advocate General, in which the arguments for and against the view that the Indian Councils Act has given validity to that document are marshalled with as much fairness as was at my command

10 I would appoint a Financial Commissioner in Oude, not because I believe for a moment that Mr Wingfield would pervert such an enquiry as I have suggested, but because, on his own

statement, it would be distasteful to him to be the instrument of carrying out a policy of which he disapproves, but which I believe to be of much less serious consequence to the talookdars than he supposes

11 It will been seen that I venture to dissent from the Governor General on the question of introducing into Oude the Bengal Revenue Regulations and Act X of 1859 All these laws assume the existence of hereditary cultivators, and probably, according to the better opinion, of hereditary cultivators with beneficial rights, but I am most anxious not to make any antecedent assumption as to the existence of such a class in Oude Further, Act X, through the operation of the section which crowns a twelve years' possession with the right of occupancy, contains a machinery for creating hereditary cultivators, whether previously known in Oude or not To put such machinery into motion seems to me an act of injustice to the talookdars, if not a breach of faith Just as we expect them to recognize old rights of occupancy, if proved to exist, so we should abstain from encumbering their estates with new rights confessedly non-existent heretofore It should be remembered, too, that the talookdars can defeat the operation of the section by wholesale ejectments of every tenant-at-will who has not been in possession for twelve years The evil of exposing them to such a temptation I need not dwell upon

12 The question of the mode of dealing with the class of rights specifically called under-proprietary takes a form somewhat different. Here there is no objection on any side to enquiry, and the tests laid down by the Chief Commissioner for deciding on the existence of these rights seem to me unexceptionable The only point is as to the period from which the title is to be traced The existing rule takes 1885, the Governor General would take some point of time much further back

13 Here, again, the exact course to be pursued cannot be decided upon till we know what is the legal position of the Record of-rights

14 The only question connected with these rights which seems to me to present any difficulty is that of good faith The talookdars have consented to the tracing of the title from an earlier period, and I suppose accordingly that the matter is not of much importance to them, but Mr Wingfield's language may, perhaps, be read as implying that their consent is conditional on our non-recognition of beneficial rights of occupancy

15 Now, I think that every pledge given directly by the Government of India to any person or class of persons should be religiously respected I would, therefore, hold the obligations of the sunnuds to be sacred, but the sunnuds contain no promise to limit the under-proprietary rights to rights commencing in any particular year

16 It may be argued, however, that, the policy of the Government having been openly declared and communicated to the talookdars, the publicity of the declaration carried with it an implied promise to maintain that policy It seems to me an answer to this that the policy of the Government was never finally settled, inasmuch as it was subject to the approval of the Secretary of State, which approval has been distinctly withheld The importance belonging to the Record-of-rights is, in fact, attributable to the accident of the Indian Councils Act having been passed before the criticisms of the Home Goverment on Lord Canning's Oude policy had been received

17. But, apart from this, I must urge that there are grave objections to admitting that any course of policy adopted or announced by the Government of India carries with it a pledge or promise to any class affected by it It is too much the habit in India to complain of the abandonment by the Government of any particular principle or line of action, as if it involved a breach of faith to those who had profited by it In old times, when the British Government had just succeeded to a despotic power which dealt with its subjects as if it were a single person, and did not affect to regard any interest but its own, it was not unnatural to look upon our declarations of policy as amounting to a personal engagement, but such a view of our position is irreconcilable with the functions of a Government which now pretends to exist for the advantage of its subjects, which is bound to carry out every measure which is likely to contribute to their happiness and prosperity, and which is not ashamed to admit that it learns by experience In point of fact the very existence of a regular Legislature in India is inconsistent with the notion of our faith being pledged to the policy of any particular year or period The indistinguishable blending of executive and legislative functions in the Government of India at the time when the permanent settlement of Bengal was effected does seem to me to furnish some ground for looking on that measure in something like the light of a compact, but I think it would be preposterous now-a-days to put the same construction on the policy pursued in 1858 and 1859 towards the talookdars of Oude

18 These considerations only touch the question of good faith. As a matter of policy I most fully admit the inexpediency of abrupt recoils from one line of action to another Knowing, as we do, how much the influence of this Government over the races which it rules depends on their impression of the stability and consistency of the principles which guide it, we must allow that it would be most unwise in the Government of India, as constituted during one five years, rashly and on the score of any trivial difference of opinion to break the thread of connection which unites it to the Government of the five years which preceded In the present instance there seems to me a justification for interference in what I will not assume, but cannot help

suspecting, to have been a cruel injustice, but certainly one reason for my preferring the course which I have suggested to that which the Governor General recommends is that it does not appear to me to amount on the face of it to so open a departure from Lord Canning's policy

19 The only further observations which I have to make refer to some passages in that letter of mine addressed to the late Lord Elgin which I mentioned before In that letter I argued that, when the Secretary of State desired information of a particular kind regarding under-proprietary rights in Oude, he must have intended to include beneficial rights of occupancy among under-proprietary rights Longer Indian experience and further acquaintance with this class of questions have, of course, convinced me that I was wrong, and that the Secretary of State's meaning was not that which I attributed to him But, though the phraseology usual among Indian officials must, of course, be taken in the sense in which they use it, I am desirous of pointing out that, in this particular case, the Indian phraseology is inconsistent with the stricter usage of European economists and jurists. I would not dwell upon such a point if I did not think it of some practical importance

20 I need scarcely say that, in the language of political economy, when *rent* is spoken of without qualification, the rent meant is always *rent by competition* It is the price paid for the use of land by somebody who has hired the land from the owner, this price being always assumed to be the highest that can be got in open market The other class of rents known as *rents by custom* and merely nominal rents, such as quit-rents and fee-farm rents, are never referred to merely as "rent"

21 Now, in the language of general jurisprudence there are only two classes of *rights*—rights of property and rights of contract. Every right which does not belong to one class necessarily belongs to the other Of course, then, a right to a *rent by competition* is a right of contract, and the duty of paying such a rent is a duty arising out of contract. If, however, we take away any of the ingredients of contract, as, for example, the open market or the power of going into an open market, the rights and obligations involved cease to be rights and obligations of contract, and by a necessary consequence become rights and obligations of property It follows from this that when a right of occupancy intervenes between landlord and tenant, their mutual rights and mutual obligations cease to come under the head of contract, on the ground that, by the hypothesis, there is no power of going into an open market. The question between a landlord and a tenant having a right of occupancy is, properly speaking, not what *rent* shall be paid, but how the produce of the property shall be divided between them If we speak of *rent* at all in such a case, we must mean a rent belonging to the class of *rents by custom*

22 An hereditary tenant possessing a right of occupancy is therefore, correctly spoken of as a part or under *proprietor* This proposition is obviously true of a tenant with a beneficial right, because he pays less than the rate which would be determined by contract, but it is also, though not so obviously, true of a cultivator who has a non-beneficial right of occupancy, that is, who pays a rent equal to a rent settled in open market, for, inasmuch as the rent has not in fact been settled between landlord and tenant in open market, there has been no contract, and the rights involved are rights of property

23 I may relieve myself from the charge of pedantry in enlarging on a question of nomenclature by saying that, in the controversy on the Bengal rent question, the erroneous phraseology on which I have remarked seemed to me to assume genuine importance A good deal of the discussion in the newspapers, and, indeed, of the argument in the High Court, appeared to resolve itself into the compendious proposition "rent is rent," that is, it was contended that a landlord is necessarily and naturally entitled to a market-rate of rent from his tenant But the truth is that rent is not always rent The question at issue related to rents *by custom*, and not to rents *by competition*, and hence all quotations from politico-economical writers were entirely irrelevant The point to be decided was how the right of property was to be distributed between zemindar and ryot, and the question under this aspect might worn a have somewhat different appearance

24 I have said that, as a mere matter of nomenclature, an hereditary tenant with a non-beneficial right of occupancy ought to be designated an under-proprietor, but I must add that I regard such a tenure as in the highest degree anomalous, and, indeed, if we could conceive the history of tenure in India to have been unbroken, I should say that it was an impossibility. The rent of a non-beneficial occupant has not been settled in open market, but yet the very existence of the tenure assumes the existence of an open market to determine the rate of rent Now, occupancy-tenures are very old in the history of the world, open markets for land are comparatively new It is much easier to me to believe that hereditary tenants never existed at all in India or parts of India, than to believe that they always existed, but were always liable to a rack-rent

25 I perceive that, in the application to the High Court for a review of judgment in the great rent case, the learned counsel for the applicants (the ryots) quoted me as an authority for the proposition that in early times the relation of landlord and tenant is always regulated by *status*, and not by *contract* The citation is not quite in point, for the word *status* only applies to personal rights, but it is true that I have advanced the corresponding proposition that in the ancient stages of society the distribution of the produce of land between owner and cultivator

is never regulated by contract. The opposite view involves in truth an anachronism, tenure being much more ancient than contract.

26 Sir Barnes Peacock answered Mr Montriou with the remark that, however true the proposition might be generally, it was not true of Bengal since the permanent settlement. And this is a sufficient answer *if it be in conformity with fact* The permanent settlement, or the interpretation put on it by Bengal Civilians of a certain school, may have reduced the original beneficial part ownership of the ryot to a non-beneficial occupancy Just the same result may have been produced in Oude by the oppressions of the Government or its agents and subordinates We have, in fact, two questions to solve by enquiry in Oude—Do hereditary tenants exist in Oude? If they exist, has their tenure retained its beneficial character?

No 29

Civil Service.

(12th July, 1864.)

I AGREE with Mr Grey, except that I am disposed to prefer the Governor General's suggestions as to the effect of taking furlough on the position of military men in civil employ, and as to reducing the number of military officers in the civil service. It is impossible not to see that we shall stultify the competition system unless we act, as strictly as possible, on the assumption that only one class of men in India have a *right* to employment—the civilians selected in England

Proceedings, Home Department, Public, September, 1864, No 64.

No 30.

Statute 24 & 25 Vict., c. 54, s 7; Civil Service, Seniority

(11th August, 1864.)

I AM inclined to concur in the view taken by the Bengal Government (as stated by Mr. Grey)

Proceedings, Home Department, General T S., 27th March, 1865, No. 273.

The Civil Service Act of 1861 repeals "section 56 of 33 Geo III, c. 52, and so much of the other sections of the said Act and of any other Act now in force as requires *seniority* as a condition or qualification for the appointment of Civil Servants to offices," &c.

The only other section of the Act of 33 Geo III which relates to the subject is section 57. The sections of "any other Act referred to" must be apparently 53 Geo III, c 155, s 82, and 3 & 4 Wm IV, c 85, s 40

The question, therefore, is—Does *seniority* as used in the Civil Service Act mean *relative* standing (which is its usual sense) or *absolute* standing, that is, length of service and residence?

I have it on Mr Grey's authority that seniority, in the sense of *relative* standing, has never given anything but honorary precedence under the first part of section 56 of the Act of 33 Geo III

If so, in order to give a meaning to the repealing clause of the Civil Service Act, we must take seniority in the sense of *absolute standing*

In that case, the provisions, as to three years' residence as a servant in section 57, 33 Geo III, c 52, are repealed, as well as the provisions regarding four, seven and ten years' standing in 53 Geo III, c 155, s 82 The words referring to residence and service are precisely the same

I do not see the use of referring to our Advocate General As we must address the Secretary of State, who seems to have expressed an opinion different from this, we had better ask him to consult *his* legal advisers, indicating of course our own views.

No 31

Competitive Examinations

(5th September, 1864)

It is evident that both the competitive system and the system of obligatory tests assume the existence of a body of persons in the country equal to constantly supplying new candidates for the vacancies which the rejected candidates have not succeeded in filling The simple question is whether such a body of persons exists in India To the exact extent in which we may assume their existence, we are justified in incurring expense in organizing a system of examinations.

Proceedings, Financial Department, Expenditure (Miscellaneous), September, 1864, Nos 419-420A.

The facts stated by Mr Taylor are something to go upon, and I would, therefore, generalize the Madras plan The success of the Civil Service Commission at home does not appear to me conclusive Fifty years ago it would have failed, even in England, because the conditions of its success did not then exist.

No. 32.

STATUTES 16 & 17 VICT, C. 95, S 17, AND 21 & 22 VICT, C 106, S 29

(10th January, 1865)

Proceedings, Foreign Department, General, A January, 1865, No 69

THE despatch came to me for signature last of the Members of Council, and late in the evening Mr Grey's note of objection was in the box, but my copy of the Act for the Better Government of India was at the Legislative Council Office, and as I felt sure the Secretary had either ascertained that Mr Grey was in error, or would look to the wording of the Act before sending off the despatch, I thought I should save time and trouble by signing

There is no doubt that the appointment is, under the above Act, with the Governor General solely. At the same time, I have no doubt that the omission of the words "in Council" was a mere inadvertence. The objects of the Act were to substitute the Secretary of State in Council for the Court of Directors, and to put the Crown in place of the Board of Control, not to change in any way the Government *in* India I had myself something to do with the preparation of part of the Act (not this part), and the above was the rule laid down

It may be a question whether the authority corresponding with the Secretary of State ought not always to be the Governor General *in Council*, or the Governor General *having the powers of Governor General in Council*, so that, when the Governor General does an act singly, the Secretary of State should be informed of it by the Governor General *in Council*. But, even in that case the form of the despatch would have to be changed

There was nothing irregular in His Excellency's first submission of the appointment to the Council Even when he need not consult the Council, he always *may* do it

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No. 33.

PUBLIC PROSECUTOR, BOMBAY

(9th November, 1865)

Proceedings, Home Department, Judicial, A November, 1865, Nos 7-10

ALTHOUGH every demand for fresh expenditure from the Government of Bombay should be regarded with caution, I believe that Government to be, in the main, right in these two applications

No useful inference can be obtained by a comparison of the duties and salaries of the Solicitors at Calcutta and Madras, and those of the Solicitor at Bombay. The Government of Bombay

is in the peculiar position of a great proprietor of land in the island of Bombay As English law prevails in the island, it is needless to say that the questions connected with land are very complex and delicate, but their difficulty is increased by the fact that a good many of the titles are affected by the stipulations in the Treaty with Portugal under which the island was ceded, and also by the fact that many of the most valuable rights of the Government of Bombay are rights accruing under the *jus publicum*, for instance, to land still under water It may be added that a new class of difficulties (no doubt only temporary) will be occasioned by late Indian legislation—the Registration and Indian Succession Acts

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As to combining the Government Solicitorship with the Government Prosecutorship, it is plain to me that the meaning of the Government of Bombay has been misunderstood, when an answer deferring the consideration of the question till it was settled in England was given *nine* years ago This must have been just about the time when the subject of Public Prosecutors was being stirred in England by Mr J S Phillimore and others But what these gentlemen wished for was a system like the Scottish—under which there is, in the State, a special department charged, not only with prosecuting, but with searching out, crime Such a system, I may observe, would have been quite inconsistent with the existence of the Grand Jury

But, as I know from conversations with the Chief Justice of Bombay, what was really asked for was something like the much smaller system which is found in Ireland, and it was from want of this clue that the misunderstanding took place In Ireland it is part of the duty of the Crown Solicitor to take up any criminal case commended to him by strong authority, for instance, by a Judge in Court, a Barrister, called a Crown Prosecutor, is also specially retained and paid by salary (the office was once held by Sir M Sausse), and he not only prosecutes, but is always ready to advise the Crown Solicitor

I believe that some such branch in the Crown Solicitor's office is really much wanted at Bombay Not only is crime so much on the increase that they are about (as in Calcutta) to hold sessions every six weeks instead of every three months, but crime of a peculiar kind, fostered by the peculiar circumstances of Bombay society, is abundant and very rarely punished Men constantly come into Court, and are guilty of the most unblushing perjury, or admit the most startling frauds, and then walk out scot-free, because no private prosecutor thinks it worth while to move in the case, and it is not the practice for the Government Solicitor to take it up, unless under special orders

As we *must* pay a larger sum to the Government Solicitor, I think that a bargain might be made with him to take up any case

to which his attention is called by any Judge of the High Court or other person in authority

As to paying a Barrister to prosecute for Government, the mode of doing so is a question of convenience and expense I believe it will be much better to give some one gentleman Rs 1,000 a month, with liberty to practise (which is the Calcutta plan) than to pay separate fees on the Bombay scale Of course, any gentleman generally retained must be at the call of the Government Solicitor or of any Mofussil Magistrate for advice

It is out of the question that the Legal Remembrancer should undertake the duties

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No 34.

Education in Burma

(5th January, 1866)

I HAVE seen these papers later than other Members, and after the short discussion in Council on the subject I am inclined to agree with Mr Grey, and I should not wonder if a favourable answer now saved us expense hereafter Educational expenditure is sure to be forced on us by the Home Government for all provinces in the long run, and, if we do not utilize the monkish establishments in Burma, we shall be compelled in the end to set up some costly system by their side Independently of this, one would be sorry not to try whether some further results cannot be got from this curious machinery which does so much up to a certain point.

Proceedings, Financial Department, January, 1866, Nos 541-547

No 35

Kutch Subjects abroad

(18th January, 1866)

I THINK we are morally bound to extend the privileges of our Native subjects in foreign territory to subjects of Native States which we bind not to have relations with foreign powers The Sultan of Muscat may, by way of precaution, be made a party to the treaty, but, strictly speaking, I think we might call upon him to regard as British subjects all subjects of Native States bound to us by treaties of depen-

Proceedings, Foreign Department, Political, February, 1866, Nos. 9-11

dent alliance. As we are the power with whom the Sultan must treat on Kutch affairs, he is bound to regard Kutch subjects as our subjects

(See Nos 37 and 89, and section 35 of the Muscat Order in Council of November, 1867)

No. 36.

STATUTES 28 & 29 VICT, C 17, S 1, AND 32 & 33 VICT, C 98, S 1

(24th January, 1866)

Proceedings, Foreign Department, Judicial, A February, 1866, Nos 1 3

THIS reference from Mysore raises some extremely perplexing questions regarding the extent of the legislative power of the Government of India

The point is, in what way can omission by a subject of the British Government resident in British India to obey the process of the Mysore Courts be made an offence punishable in British Courts The case naturally occurs in frontier districts like Bellary

There is no doubt that Mysore is not part of "British India" in the sense in which those or equivalent words are used in the statutes giving legislative power to the Governor General in Council As to the position of Mysore and the manner in which certain British Indian enactments have been brought into force there, I beg to refer to my note of March 5th, 1864, put up with the papers

I agree with the Advocate General of Madras that the offence of disobeying the process is an offence against the Court out of which it issues, *i e*, against the Mysore Court in this case The question is whether we can make it an offence against our Courts and laws by legislative enactment. What we have to do (if we have the power) is to make something penal which is done or omitted in foreign territory, for Mysore is for legislative purposes foreign soil

The Indian Councils Act, repeating the words of previous Acts, gives us legislative power over "all persons, whether British or Native, Foreigners or others within the said (*i e*, British Indian) territories, and for all *servants of the Government of India* within the dominions of Princes and States in alliance with Her Majesty"

The inconvenience of the implied restriction (which prevented our legislating for servants of *Railway Companies* in Native States) led this Government to make a strong representation to the Secretary of State, who promised to apply to Parliament

and accordingly by a statute passed last session (28 Vict , c 17, s 1) our legislative power is extended to all *British subjects of Her Majesty* in Native States

But unfortunately these words "British subject" in all the statutes relating to India mean "*European British subject*," and in the preamble to the statute of last session an older Act is recited in which British and Native subjects are expressly contrasted The preamble runs, "Whereas (by a certain statute) the Governor General in Council may make laws and regulations for all persons, *British or Native*, within the Indian dominions, and whereas it is expedient to enlarge the power of the Governor General in Council by authorizing him to make laws and regulations for *all British subjects* within the dominions of (Native Princes)," &c

It would seem, therefore, on the face of the Act, that we may legislate for the acts or omissions of a European in Native territory, but we cannot legislate for those of a native of British India when in a Native State We can direct a European in Bellary to obey Mysore process, but not a native

These and the like consequences seemed to me so preposterous when I read the new statute that I at once wrote privately to the Under-Secretary of State to ask what could be the meaning of the restriction I specially asked whether the India Office supposed that, in consequence of the primary allegiance owed by every native of British India to its Government, that Government had an inherent power to legislate for him wherever he might go

If this last question is answered in the affirmative, I think we might venture to legislate both for natives and Europeans, although I do not consider the doctrine, even if accepted by the India Office, a sound one, for the legislative power of this Government is wholly derived from statutes and must be limited by them

There are, of course, contrivances by which the difficulty could be eluded We can, of course, force our subjects in Bellary to go to the frontier and make it penal to come back without a certificate of attendance at the Mysore tribunal But I do not think such expedients reputable

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The difficulty, I would add, only arises with reference to the attendance of witnesses Decrees of the Mysore Courts can be executed in British India under the comity of nations, though, if we legislate, that too had better be legislatively regulated

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(*See No 43*)

If Mr Massey consents, no time should be lost in asking these two gentlemen to address themselves to the question

(*See No 95*)

No 39

APPLICATION OF ENACTMENTS TO FOREIGN TERRITORY.

(*10th February, 1866*)

Proceedings, Foreign Department, Judicial, February, 1866, Nos 7-8

BERAR, being governed in the name of the Nizam, is under the legislative authority of the Governor General in *Executive* Council The proper expression, however, for introducing the Act is not "extend," which has a technical meaning in India The Government should direct that the Act be *applied* to the Berars

I do not believe in the success of the Cotton Frauds Act, but it would be exposing it to an unreasonable strain if it were left in force on one side, and not on the other, of the imaginary line which separates the Berars from the Bombay Presidency It is to be observed that there will be some outlay for establishments

(*See Nos 21, 71 and 91*)

No 40.

DISSENT FROM POLICY OF A MEASURE BEFORE COUNCIL, ACT XXI OF 1866.

(*20th February, 1866*)

Manuscript file of papers of Act

I BEG to state to the Viceroy and my honourable colleagues that it is at present my intention on Friday, March the 9th, to move that the Native Converts' Divorce Bill be passed with the amendments proposed by the Select Committee, and with the further amendment to be mentioned below

The Secretary (or late Secretary) of State having, in consequence of some difficulties which arose in the last session, expressed a strong opinion demi-officially that the Members of Council ought to follow the rule of the English Cabinet, and to exhaust all differences of opinion on important Government measures by discussion in the *Executive* Council, I propose to bring up the subject on Wednesday, February 28th I do not know that there is likely to be any difference of opinion, but this is the only measure of the session which has excited any considerable interest outside, and it is a Government Bill, as will be seen from the letter to Bengal, dated August 29th, 1864, and put up

It may save time, however, if I say something of the history of the measure

It is necessitated by some provisions of the Indian Marriage Acts [XXV of 1864, repealed and re-enacted by V of 1865, the latter put up]. Clause 3, section 48 of the last Act, makes it a condition of the marriage of Native Christians under Part IV that "neither of the persons intending to marry shall have a wife or husband still living," and section 19 makes it probably impossible (through the operation of the words "lawful hindrance") for a Native Christian having a living wife or husband to be married under Part II

What was the state of the law on this subject before 1864 is a matter which has never been clearly ascertained, and, indeed, I have been much struck, during the discussion on the Bill, with the universal vagueness of the opinions which have prevailed on the questions involved under all their aspects Sir B Peacock held that a convert having a wife alive could not be married by a Registrar under Statute 14 & 15 Vict, c 40, and Act V of 1852, and on the whole, considering the terms of the Statute, I think he was right, but those laws are only permissive It is also possible that in consequence of the wide language of the Statute of Geo IV (which, however, was never intended to apply to such a case, and has been impliedly repealed by the Penal Code) a re-married convert might, in the Presidency-towns and by the Supreme Court, have been punished for bigamy My own opinion, however, is that, if the convert kept clear of the difficulties created by the English statutes, he might not only have lawfully married a new wife, but as many wives as he pleased, provided his original religion permitted polygamy It seems to me inconceivable that he could so have changed his legal position as to have rendered marriages subsequent to conversion invalid If so, the Penal Code would not apply to the case

I enquired into the subject when I was on the western side of India, where the line between heathenism and Christianity is sometimes very faint, and I found that there were tribes which, at periods of years, oscillated between some form of Hindooism and some of the Oriental forms of Christianity, such as Nestorianism This change made no difference in their habits of polygamy, but nobody had ever heard of the criminal law having been brought to bear on them, or of the civil rights of their children having been affected

Practically, over the greatest part of India, the missionaries re-married or refused to re-marry their converts according to their conscience and theological views, but they constantly protested against the uncertainty of the law

But in 1864 it was finally determined to put an end to the numerous and formidable doubts which had arisen concerning the whole Christian matrimonial law of India, in its application, not only to Natives but to Europeans The framers of Act XXV of 1864 decided to bring Native converts under the general

rules governing Christian marriages, but it was with the clearest knowledge that the special case of a Native convert deserted on religious grounds by wife or husband would have to be dealt with separately The point was repeatedly discussed by the Select Committee, which agreed in the course proposed to be followed On the Bill coming into Council, the Lieutenant-Governor of Bengal tried to introduce words which would have forced the Government to legislate, but withdrew them on its being urged that it was not the province of the Legislature here to force any particular policy on the executive But the Government, as it seemed to me, distinctly pledged itself to consider the point, and the letter of 29th August, 1864, was the redemption of the pledge

It appears to me that it was simply impossible for the Government to decline legislating It had requested the suspension of a former Bill (Sir C Jackson's) on the ground that the matter was pre-eminently one for a Government measure, and now, by Act XXV of 1864, it had withdrawn the liberty of re-marriage, practically, or probably legally, enjoyed by Native converts This withdrawal it had effected on derivatively religious grounds, for there could be no other reason for forbidding a convert to practise polygamy But if so, it is bound to limit the withdrawal to the exact extent of the theological doctrine on the subject of marriage Now, it is absolutely clear that the immense preponderance of theological opinion is in favour of allowing a convert deserted by wife or husband to re-marry I find that in introducing the Bill I stated the case too mildly when I said that there was a more general concurrence of opinion throughout the Christian world in favour of divorce on the ground of persistent heathenism than in favour of divorce on the ground of adultery. The truth is that (putting aside certain hasty opinions expressed in India) there is no authority whatever against the principle of the Bill It will be conceded, I suppose, that *original* theological opinions, *i e*, opinions which run counter to received theology, cannot claim the attention of a secular Legislature

The Bill, it will be seen, is strictly limited to its purpose It introduces an exception into clause 3 of section 48 of Act V of 1865 The case to which it applies is that of a marriage subsisting after conversion in point of civil law, when conjugal society is practically impossible through the prejudices of caste It does *not* apply to the case of a marriage dissolved by conversion, or to marriages terminable at pleasure, such as are said to exist in Burma This will be readily seen if the definitions of "Native husband" and "Native wife" are referred to

The Select Committee exempted Mahomedans from the measure This was not strictly necessary, for the legal doctrine on which the Mahomedans rely might always be urged as an objection to the jurisdiction of the Court But the Committee

thought the law so perfectly clear that there was no use in exposing any Mahomedan to the chance of a suit

Since the Report of the Select Committee was presented, the Hindoos have shown some little jealousy of the exemption of Mahomedans They wish it to be understood that a Hindoo is also divorced by conversion I affirm, however, with some confidence, that such a divorce will never be established to the satisfaction of a Court of Justice under the general law of Hindooism The only passage which bears directly on the point is a famous one from the Potito, which apparently legalizes widow marriage. It is well known, however, that the Indian Courts before the Widow Marriage Act always held that the marriage of a woman was unlawful even when her husband was dead, much less would they now hold it lawful in the case where the husband had become an outcast,—a change which the passage in question seemingly puts on a level with death In fact, the orthodox Hindoos hold that the passage is, in this age, the Kalijuga, no longer of binding authority

The only other passages which can be adduced are those in which the degradation of an outcast, and the shame of all commerce or contact with him, are described and illustrated Some offensive samples of this may be read in the petitions of the British Indian Association It is because I do not wish to encourage the collection of such passages that I object to comply with the request of an anonymous Native who, with some simplicity, has telegraphed to us from Agra to delay the Bill for three months, in order that he may have time to think of objections to it

While, however, I am sure it is impossible to establish that conversion operates as a divorce under the general law of the Hindoos, I am not satisfied that (Hindooism being a general name for a great many different religions) some Hindoo sect may not be able to show that, under its peculiar rules, desertion of the religious body dissolves marriage Such a plea, if made out, would bar the suit To make sure of such points being authoritatively settled, I propose—without departing from the wise resolution of the Committee not to allow appeals—to move an amendment (put up) enabling the Judge to "state a case" for the opinion of the Court above It is at the discretion of the Judge to do this Probably the first two or three suits will produce a final decision on the only substantial question, and after that the statement of cases can very rarely be required in the interests of justice

The difficulty of the subject, which is strongly described in the Government letter of August 29th, 1864, does not arise from any doubt as to what ought to be done, but from the impossibility of completely reconciling the Christian and non-Christian view of the necessities of the question The unconverted Native has no objection whatever to the convert re-marrying what he

objects to is the attempt to bring over the original wife. On the other hand, the very foundation of the Christian theological doctrine is the tried and tested unwillingness of the wife to cohabit with the husband Some extreme views on this last point will be found among the papers which have been circulated—as, for example, that the husband and wife should be compelled to live for several weeks together in the same house, or that the Judge should have an unlimited discretion to multiply the interviews between them Those who oppose the ultimate dissolution of the marriage go, in point of logic, even beyond this, for, if they were consistent, they would argue for the compulsory restitution of conjugal society, which is the legal deduction from their first principles under all European Codes

On the whole, it must be allowed, I think, that the Government could not refuse to move in the matter, and, that assumption being made, it may be claimed for the Bill that it effects an equitable compromise between conflicting opinions The procedure intended to ascertain the wife's volition is as simple as is consistent with a genuine attempt to establish her willingness or unwillingness to follow her husband On the other hand, the *bonâ fide* objections of Hindoos have been met by the changes introduced by the Select Committee at the instance of the two Native Members of Council

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(*See No 42*)

No 41

Municipal Police

(*1st March, 1866*)

I AM of Mr Grey's opinion It is clear to me that, until *Police expenditure is locally imposed* all over India, injustice is done to cities like Calcutta by *at once* compelling them to pay for Police and refusing them aid towards public improvements

Proceedings, Financial Department, Expenditure (Police), March, 1866, Nos 266-272

No 42

Council of the Governor General of India, Law Member, Act XXI of 1866

(*5th May, 1866*)

I SHOULD have added nothing to these papers if I had not thought it due to the trouble which Mr Grey has taken to define the position of the Legislative Member of Council to say

Manuscript file of papers of Act

that I entirely accept his view of that position I am unable to understand how my Minute of April 12th can have suggested that I put forward further and larger claims than those which Mr Grey deems reasonable—at all events I now protest against its being supposed that my doctrine on the subject differs, or ever differed, from that exhaustively set forth by Mr Grey

My theory of the duty and situation of the Legislative Member of Council—that is of the Legal Member of Council when charged, as he ordinarily is, with the legislative business of Government—has been many times explained in correspondence with the various Legislative Secretaries with whom I have acted, and some of this correspondence can, no doubt, be produced from the Legislative Office, if necessary I consider a Government Bill to be simply an instrumentality for carrying out an order of the Executive Government that the law be altered in some particular I consider that, when an order to prepare a Bill has been given in the form of a reference to the Legislative Department, the Legislative Member of Council has no more discretion in the matter than has the Advocate General when directed to conduct a particular case in Court The Legislative Member may have had great influence in determining the question whether the order for legislation should be given, but that has been in his executive capacity as *Legal* Member of Council, the order once given, he has nothing to do but to prepare the Bill and justify it as best he can to the Council for making Laws and Regulations

This theory corresponds with the actual history of my office When the Legislative Member was Legislative Member and nothing more—when he was not a Member of the Executive Government—though he was admitted by courtesy to the discussion when legislation was contemplated, yet the proceedings terminated (as I am informed) in an order to him, by name, to prepare a Bill, and the Bill when framed became law before the institution of the Legislative Council by the fiat of the Executive Government Further, the theory corresponds with facts I affirm that I have never introduced a measure into the Legislature without the sanction of the majority of my colleagues, expressed or implied I add "implied," because there are some Bills so simple or of so routine a character that one takes the permission of the Executive Government for granted on the principle on which, in certain matters, any Ordinary Member of Council makes an order by himself It would be too much to say that I have made no mistakes in assuming this permission, but these were mistakes, and not evidence of any counter-theory

In short, I regard myself in my legislative capacity as the ministerial agent of the corporate Executive Government, dependent for any mitigation of the strictness of my obligations upon the consideration and good sense which I rely upon in my colleagues

If it had ever occurred to me to think that these views required

justification by argument, I should have maintained in principle the authority of the corporate Executive Government over its Members in their legislative capacity, on the ground that any other doctrine would lead precisely to the consequences which Colonel Durand deprecates It must be recollected that it is not merely the unlimited liberty to oppose which is in question, the unlimited liberty to propose is in question also, one cannot be conceded without conceding the other Am I then, or is any Ordinary Member of Council, free to come down to the Legislature and move for leave to repeal the Native Articles of War, or to re-impose the income-tax, or to raise a loan for public works? Yet if the negative policy of the Executive Government is to prevail against an individual Member in one case, why should its affirmative policy not prevail in the other? For the means of combating such indiscretion as I have described, which, though it may not be often so formidable as in the extreme cases I have put, may yet be very great and very embarrassing, Colonel Durand would apparently rely on the feeble and uncertain check of opposition and counter-argument from the colleagues of the delinquent in the Public Council My honourable and gallant colleague has been good enough to credit me with qualities which he hypothetically denies to my successor, from this point of view, let me first suggest that there may one day hereafter be at the Council table a fluent, confident, popularity-hunting lawyer, whom it may not be very easy for his colleagues to put down or confute on the spur of the moment

As Mr Grey has observed, there have been few measures entailing so little responsibility on the Legislative Member and Legislative Department as the Bill on which this discussion has arisen I think so well of the Native Converts Bill that I should not be sorry to claim all the credit of it, but the truth is, a very small share of it belongs to me Not only was the subject under active discussion for twenty years, and legislation upon it distinctly ordered by Government, but the instructions for the details were actually given by, what may be called, a mixed Committee of the Executive and Legislative Councils An informal meeting was held, at which Messrs Harington, Anderson, Cust, Muir, (possibly) Taylor, and I were present, and there the procedure was settled, which was made more stringent in the original Bill than in the Act just passed These extraordinary precautions were taken that the disagreement believed to exist on a subject so much controverted might be reduced to a minimum It was impossible to compromise differences of opinion as to principle, but, the principle being granted, there was no difference of opinion as to detail, except on certain points Mr Harington objected to allowing the wife to sue, Mr Muir objected to the recognition of infant marriages, and I myself was not satisfied with the provisions as to alimony and custody of children And as some of Colonel Durand's expres-

sions may, perhaps, be taken as meaning that proper effect was not given to the Government order, because the Bill did not declare that, in the case of two Indian sects, the Hindoos and Mahomedans, conversion dissolved the marriage, I beg to add, not for the purpose of combating the doctrine, but in order to state a fact, that no such suggestion was made or opinion broached, either by the advocates or by the opponents of the proposed legislation So far, indeed, as regards the Hindoos and so far as regards the opponents of a measure of relief, it is the less likely that any such course should have been suggested, because in all the voluminous records of this protracted controversy there will not be found an argument against relief, of more than four months' date, which does not either proceed upon or assume the absolute indissolubility of Hindoo marriages

As some Members of the Government have reserved their opinion, and others have given it subject to a contingency which may or may not happen, these papers must again be circulated, but I cannot send them on without joining earnestly in the hope expressed by most of my colleagues that this discussion may be confined to ourselves

Upon consideration, I must recall the words with which my Minute of April 12th commences So far as Colonel Durand's Minutes contain arguments against the Native Converts Marriage Dissolution Act, it seems to me that by recording them he will expose himself to some misconstruction, set a precedent highly inconvenient to Government, and inflict some injustice on those who take a different view from his of their duty I fully admit that, in the exceptional case of the Government considering that its policy required the silence in open Council of a dissentient Member, the dissentient would be entitled to record an Executive Minute, and in that event it might be proper to suspend legislation, which is rarely urgent, until the opinion of the Home Government could be taken. But the case has not occurred, and, that being so, surely the inconvenience of continuing a closed debate upon paper does not require to be established by argument Such a course tends to no practical end The proper function of argument against a Bill is to prevent its being passed, not to discredit it when it has become law It may, perhaps, be argued that these Minutes constitute an appeal to the Secretary of State to *veto* the Act But the Secretary of State, when a Bill of importance has been some time before him, adopts, for obvious reasons, the practice of intimating his dissent before the Bill passes, and in this particular case it is little likely that the Home Government will annul a measure which was sent Home a year-and-a-half since, which has been obtruded on its attention through the publicity it has gained, and which has undergone no change except in the direction of simplification. Nor is the recording of the Minutes

quite fair to the supporters of the measure Colonel Durand's observations are much less criticisms on the new law than criticisms on the arguments by which I attempted to justify it Had these observations been offered by an opponent in open Council, I might, perhaps, have found some reply to them, but I am certainly not going to be betrayed into adding another to the many sources of misapprehension which this discussion has shown to exist as to the position of the Legislative Member, by defending out of Council the line of argument which I thought fit to take up in advocating this measure on behalf of Government

But, if this part of Colonel Durand's Minutes is recorded, I would suggest the correction of one error of fact. Colonel Durand has twice spoken of the Parsees as exempted from the operation of the new law They are not, however, exempted It is true that, in a project of law sent up by the Bombay Parsees for the amendment of their marriage law, there was a provision that conversion should be a ground of divorce But this provision was energetically opposed by Mr Harington, and was struck out. I suspect that, in some early drafts of the Native Converts' Divorce Bill the word "Parsees" was provisionally inserted in the exemption clause, there to remain until the point should be settled in discussing the other measure This may be the source of Colonel Durand's mistake The truth is that, out of all the purely Native religious communities of India, amounting, it is said, to sixty-eight, only one, the Mahomedan, is exempted, and that was exempted by the Select Committee on the grounds stated in its report.

But whether these Minutes, so far as they observe on the Native Converts' Divorce Act, are or are not sent Home, I earnestly deprecate the formal recording of so much of them as relates to the authority of the Executive Government over its Members in their legislative capacity I deprecate it on the following grounds —

First—Because the opinion of Sir Charles Wood, out of which the discussion has grown, was never intended by him or by me to appear on record I consider it would have been most improper to record it, and that the proper course was to repeat it orally in Council That note of mine which was mistaken for a Minute was merely intended to save time by sparing the Council a long preliminary statement.

Secondly—Because the course of the discussion has been marked by great misapprehension, as Mr Grey has shown, regarding the position of the Legislative Member, and most assuredly by great misconception of the pretensions advanced by myself

Thirdly—Because there is no true issue Nobody has been prevented from opposing a legislative measure When the policy of the Government, as settled by the majority of the Council, requires the prohibition to be given, it will be time to

I perfectly agree with His Excellency that the difficulty is formidable, and I would suggest that a strong despatch should be drafted at once on the Mysore case (pointing out its general bearing) and founded on the notes of last January It should beg Lord deGrey, late as it may be in the session, to try to pass a short Act interpreting "British subjects" in Statute 28 Vict, c 17, to mean, not only European British, but all subjects of Her Majesty in British India and all persons through residence or domicile there owing allegiance to Her Majesty It should go by this mail It might be added that our Advocate General has expressed doubts which, right or wrong, are formidable, whether certain past Acts of this Legislature punishing crimes committed by Native subjects in Native States are valid in consequence of this defect of legislative power

(*See No 36.*)

No. 44.

JURISDICTION IN ABU, STATUTE 28 & 29 VICT, C 15, S 3

(*22nd May, 1866*)

Proceedings, Foreign Department, Judicial, June 1866, Nos 7 9

I UNDERSTAND Abu to be not British territory, but to be administered (at all events as regards British subjects) by purely British authority, such an authority being, however, in theory delegated from the Rao of Serohi

If I am right, I would answer as follows in respect of the four points put by the Agent to the Governor General —

1 I agree as to appeals with the Agent to the Governor General

2 Under a Statute of last session, 28 Vict, c 15, the Governor General in Council has power to authorise any High Court to exercise any jurisdiction conferred by its Letters Patent in respect of *Christian* subjects of Her Majesty resident within the dominions of such of the Princes and States in alliance with Her Majesty as the Governor General in Council shall determine The comprehensive term "Christian" was doubtless used because it might be convenient to give a particular High Court matrimonial and testamentary jurisdiction over all Christian subjects, but under this clause an order might be made that European British subjects should be committed to the Bombay High Court (which is no doubt the right Court) from Abu But, before anything is done, it might be well to enquire from the Home Department what has been done towards carrying out the recent Statute I believe the subject was taken up last year during my absence from India

3. I agree as to constituting the Magistrate a Small Cause

Court Judge up to Rs 500 According to my view, this Court will be established, not under British legislation, but under the delegated authority of the Rao of Serohi. Whether his consent must be asked will depend on the question whether our powers of administration are general (as in the Assigned Districts) or special

4 I would certainly introduce the two Codes. Whether the consent of the Rao should be asked (as suggested by the Agent to the Governor General) will depend on the point mooted in the last paragraph

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No 45

STATUTE 28 & 29 VICT, C 15, S 3

(29th May, 1866)

Proceedings Home Department, Judicial, A July, 1866, Nos 32 39

THE note prepared in the Home Department, on the nature and extent of the jurisdiction to be assigned to the High Courts, evidences much labour and research, but it does not appear to me that Statute 28 Vict, c 15, intended, or that it is expedient, that the Government of India should undertake the immense task of all at once defining and limiting by one notification the various branches of jurisdiction to be exercised by the High Courts The notification suggested by the Secretary of State was nothing more than a *negative* notification One of the repealed sections of the Statute establishing the High Courts having conferred on the High Courts the extra-territorial jurisdiction of the abolished Supreme Courts "until the Crown should otherwise provide," and the power of altering the extra-territorial jurisdiction having been transferred to the Governor General in Council, the Secretary of State, out of abundant caution, thought it proper for the Government of India to announce its intention of not exercising at present its new prerogative

Statute 28 Vict, c 15, must be interpreted by reference to the two sections (10 and 18) of Statute 24 & 25 Vict, c 104, which it repeals It is plainly intended to enable the Governor General in Council, subject to the veto of the Secretary of State, to do certain things by notification which, under the repealed sections, could only be done by the Crown The only difficulty arises from its not describing the powers to be exercised in the same language

The repealed section 18 empowered Her Majesty to transfer, from time to time, any territory or place from the jurisdiction of any one to the jurisdiction of any other High Court, and

generally to alter and determine the territorial limits of the jurisdiction of the High Courts

The repealed section 10 conferred on each High Court the extra-territorial jurisdiction of the corresponding Supreme Court, until the Crown should otherwise provide under the provisions of the Statute

Section 3 of 28 Vict, c 15, empowers the Governor General in Council—

(*a*) to transfer any territory or place from the jurisdiction of one to the jurisdiction of another High Court

(*b*) to authorise any High Court to exercise all or any portion of its jurisdiction and powers within any such portions of Her Majesty's dominions in India not included within the Presidency or place for which such High Court was established, as the Governor General in Council shall, from time to time, determine

(*c*) to authorise any High Court to exercise any such (*i e* all or any part of its) jurisdiction in respect of Christian subjects of Her Majesty resident in such Native States as the Governor General in Council shall determine

Under clause (*a*), the plainest case is an actual transfer of territory, as, for example, the transfer of Behar to the jurisdiction of the High Court of the North-West

Under clause (*b*), the western part of the Central Provinces might be wholly brought within the jurisdiction of the High Court of Bombay, or, again, the High Court of Bombay might be empowered to exercise *part* of its jurisdiction over all, or part, of the Central Provinces—for example, its jurisdiction over European British subjects criminally charged, or such matrimonial or testamentary jurisdiction as it now exercises over European British subjects in the Bombay Presidency beyond the limits of its ordinary original jurisdiction

Clause (*c*) is very large, taken literally, it would allow us to give the High Courts appellate civil jurisdiction over Christians in Native States, but the use of the phrase "Christian subjects" indicates what, no doubt, was the real intention, *viz*, that the portion of jurisdiction meant to be exercised was that usually exercised extra-territorially,—*i e*, matrimonial, testamentary and criminal jurisdictions

It is a question whether any of the powers conferred—large as they are—would enable us to extinguish a concurrent jurisdiction For example, certain branches of extra-territorial jurisdiction are exercised by the High Court of Bengal in Oude and in the Central Provinces Suppose the Letters Patent of the High Court of the North-West to confer on it extra-territorial jurisdiction in Oude or suppose the Governor General in Council to confer extra-territorial jurisdiction over the Central Provinces on the Bombay High Court, can we extinguish the concurrent jurisdiction of the Calcutta Court by notification?

On the whole, I am inclined to believe we can under clause (*a*), by construing transfer of territory to mean transfer of territory, *quoad* partial jurisdictions, such as criminal jurisdiction over European British subjects

It seems to me that it would be wise to wait awhile before acting on most of the powers conferred by the new Statute The only matter which presses, I think, for settlement is the allotment between the four High Courts of the criminal jurisdiction over European British subjects in provinces not included within the territorial jurisdiction of any High Court and in Native States The questions involved are questions of local situation and facility of communication I would suggest that, as soon as the North-West Letters Patent are received, a note be jointly prepared by the Home and Foreign Offices, confined to the point

It will be seen that we might, if we pleased, make Eurasians and Native Christians, subjects in Native States, committable to a High Court, but I would not do it, but trust to our soon having power to settle the matter by legislation on the principle of Act I of 1849

As to committals from Native States to the Chief Court of the Punjab, we should be simply silent, and I would leave out of the notification the names of Native States from which it may be convenient to commit European British subjects to the Chief Court It must be remembered that all we confer on a High Court by notification will be jurisdiction to try We do not legalize arrest in a Native State without the consent of the Native Ruler, expressed or implied, and, if we can obtain the consent of the Chiefs of the States abutting on the Punjab to remove European British subjects charged with crime into the Punjab, the Chief Court will have ample jurisdiction to try them under the Act

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No 46

Act I of 1865, Extension and Construction of Acts

(6th July, 1866)

Proceedings, Home Department, Judicial, September, 1868, Nos 43-46

I CANNOT help entertaining the most serious doubts of the legality of the course followed by the Punjab Government in thus extending the Code of Civil Procedure

In my opinion, it has been extended under the wrong Act and very pernicious consequences follow from the error

Certain Acts of the Governor General in Council contain a section at the end enabling the Government of India or the Local

Government to extend the law to territories to which it did not primarily apply A section of the kind is added to both the Acts which the Punjab Government now pretends to extend Such a power of extension is very convenient in practice, but it has not been given in all Acts applying to regulation territories hence Act I of 1865 was passed. Its object was to supply the power of extension in cases where it was not given by the original Act Now, however, the Punjab Government has employed Act I of 1865 for the extension of two laws which contain in themselves a power of extension

I hold that this cannot be done, and that Acts VIII of 1859 and XXIII of 1861 can only be extended by virtue of the power which they themselves confer

My reasons are as follows —

The step taken by the Punjab Government leads to an absurdity, section 39 of Act XXIII of 1861 (which is the section giving the power of extension) is itself extended The Punjab Government has not excepted it.

One of the most important provisions of Act XXIII of 1861 is impliedly repealed. Under that Act, when the Code is extended "subject to any limitation, restriction or proviso," the previous consent of the Governor General in Council is required (section 39) Now, the Punjab Government did not wish to extend the Code simply, but, by affecting to extend in this way, it has got rid of the consent of the Governor General in Council to the modifications proposed to be introduced No doubt this was its real object

We have been advised by the Advocate General, and I entirely agree with him, that when a portion of an Act is extended under Act I of 1865 it must be an integral or substantive part, not a part which by omission of provisions coherent with it falsifies the spirit of the original enactment. Now the Code of Civil Procedure, being a Code, cannot be dismembered, and a part of it only extended to the exclusion of the rest The only way in which it can be modified is by the introduction of express provisos or limitations under section 39 of Act XXIII of 1861

Finally, the mode of extension destroys the enactment extended When the Code of Civil Procedure is extended (subject to proviso, restriction or limitation), it is intended that these provisos, &c, shall be expressly set forth, so that there shall still be a Code But the Punjab Government has simply omitted certain sections of the Acts extended, leaving the existing procedure standing in the gap, so that the Punjab is still without a Code No possible construction of Act I of 1865 can legalize the extension of the Code in such a way as to make it no Code

I would telegraph to the Punjab Government and say we entertain very serious doubts of the legality of this extension

under Act I of 1865 I would ask whether the recommendation of the Chief Court embraced the mode of extension, if not, request them to cancel the notification.

(9th July, 1866)

It is too much the habit in India to suppose that we are bound to submit to all the preposterous or inconvenient consequences which seem to follow from the inadvertent use of over-general language in legislative enactments No such system of interpretation prevails in England, where, on the contrary, it may be said that merely general language in a statute goes for very little indeed The true reason why the framers of English Acts of Parliament, when they wish to negative or affirm a general principle, almost invariably go on to negative or affirm a number of particular instances of it, is, that they are aware of the tendency of Courts of Justice to disregard general language unless very aptly chosen and very comprehensive in its scope

If the point to be proved be taken for granted, and it be assumed that Act I of 1865 has repealed section 385 of Act VIII of 1859 and section 39 of Act XXIII of 1861, of course the arguments employed in my first note are good for nothing But these arguments were really intended to show that the sections I have mentioned had not been repealed To the implication arising from the general language of the Act of 1865, they opposed the implication arising from the paradoxical consequences to which the doctrine of repeal would lead Such arguments prevail every day against general phraseology in English Courts, and, indeed, the consideration that the Legislature, if it intended to repeal the sections, has tacitly and by inference substituted an inferior functionary for a higher in the privilege of modifying very nearly the most important law it has ever passed, and has, moreover, enabled that functionary to falsify the whole nature of the law in question, would be to my mind conclusive that in point of fact there was no intention to do anything of the kind even if I had no other clue to the intention of the Legislature But in the construction of a law the whole question is—What did the Legislature intend?

If, indeed, no other meaning could be assigned to the language of Act I of 1865 than that it was intended to repeal all former extending sections, I admit that this meaning must prevail, but it is quite possible to assign an ample meaning to the Act and fit to save it from the extraordinary construction put upon it by the Punjab Government, namely, by holding that it was intended to confer a power of extending Acts which do not contain any extending section This we know to have been the real intention of the Legislature, and I may add that in my judgment, and I believe in that of more than one Judge, it is competent to an Indian Court in interpreting an Indian Statute

to look at the Statement of Objects and Reasons for the purpose of arriving at a probable opinion respecting the general policy of the Legislature in regard to a particular law I have no doubt that the statement would in this case be conclusive

The opinion which I expressed in my first note respecting "portions" of Acts extended, and to which I hold quite irrespectively of anything the Advocate General has said or may say, requires, perhaps, some amplification I hold that, even if a Local Government could have extended the Code of Civil Procedure under Act I of 1865 (which I deny), it could not have extended it with exceptions, but must have extended it in its integrity The matter involves principles of great importance

Act I of 1865 was a measure of Mr Harington's, and I freely confess that, immersed as I then was in the heated discussion on the Grand Jury Bill, I did not sufficiently attend to Mr Harington's legislation But I have recently been led to think it a measure of doubtful policy, not because the principles on which it should be applied are not ascertainable, but because their application is somewhat too delicate a process for the authorities who have obtained new powers under the Act

I venture to lay down broadly that Act I of 1865 cannot be so interpreted as to confer legislative powers on any Local Government If the Council of the Governor General has affected to confer such powers, the attempt is *ultra vires*, both because the Indian Councils Act has prescribed a way (which by implication is the only way) in which a Local Government may be invested with legislative authority, and also because the Council of the Governor General for making Laws, itself holding a delegated legislative authority from the Imperial Parliament, cannot, on the well-known legal principle, delegate its powers to any other persons or body I do not mean to say that the principle last mentioned has always been kept in view by the Indian Legislature The power of making rules in matters of minor importance which is conferred on particular functionaries by several Indian Acts seems to me only defensible when the Act strictly limits and describes the principle and subject-matter of the rules to be made So, too, when the Code of Criminal Procedure is extended by the Government of India and Local Government conjointly under Act XXIII of 1861, with "provisos, restrictions and limitations," I hold that those provisos, restrictions and limitations must not contravene the spirit and principle of the section which they modify

The extending section which is added to many Indian Acts stands on different grounds and is quite justifiable The Legislature considers a particular enactment in principle and detail, and applies it at once to a part of India It then confers on the Imperial or Local Government a power of extending it to other parts of the Empire Such a provision is identical in principle with a provision postponing for awhile the coming into

operation of an Act, and is, in fact, merely a postponement of a law for an indefinite, instead of a definite, time

The question whether the extension of an Act or part of an Act under an extending section or under Act I of 1865 is legitimate and valid, is therefore this Did the Legislature deliberately consider and deliberately intend to apply to part of India the law now extended, and has the effect of the extension been strictly confined to enlarging the sphere of the law's operation? If anything further or other than this has been done, then I quite accept Mr Grey's inference that the Local or Executive Government has been legislating, but then I draw the further inference that it has been doing something which it can only do lawfully under the provisions of the Indian Councils Act

The difficulty will only arise when a portion of an Act is attempted to be extended under Act I of 1865 To apply the test is then by no means easy—that is to say, whether a portion of an Act severed from the rest expresses a deliberate provision conceived in the mind of the Legislature It is obviously possible to extend a "portion" of an Act so as to introduce a law never contemplated for a moment by the enacting power Everybody will see that a section cannot be extended "with the omission of the word *not*," but less extreme, and therefore less simple, cases must be constantly occurring I can lay down the rule in no better words than I employed before that the portion of the Act extended must be an integral or substantive portion

If the laws affected to be extended by the Punjab Government were other than they are then, assuming they could be extended at all under Act I of 1865, I would by no means, at least without more attentive consideration than I have been able to give to the point, lay down that the exceptions made by the Punjab Government are illegitimate But, as these laws purport to constitute a Code, that is an expressed and completed body of law, I hold that they cannot be extended with omissions, which omissions are to be filled up in the application of the Code with laws or rules derived from semi-popular manuals and judicial circulars Such a law as this was never present to the mind of any lawful Indian Legislature While, therefore, I have little hesitation in saying that an English Court of Justice would rule that the Code of Civil Procedure could only be extended under the appropriate sections of the two Acts constituting the Code, I have no doubt that, if the Code can be extended under Act I of 1865, it can only be extended without omission or exception

I have no objection to the course suggested by Mr Grey, and the answer, when received, will, no doubt, have a bearing on the steps which ought to be taken But, with all deference to Mr Justice Boulnois, and with somewhat less to Mr Justice Roberts, whose principles of interpretation, tested by his recent decisions, seem to me rather servile and narrow, I cannot pro-

mise to surrender my opinion, which has been well considered, even if the Chief Court has recommended the course followed The matter is not one in which the Court can have pronounced judicially Unless my views are overruled by my colleagues, I should wish them to be brought to the knowledge of the Punjab Government

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No 47.

INDIAN COMPANIES ACT, PRESIDENCY BANKS.

(31st August, 1866)

Proceedings, Legislative Department, May, 1882, No 15

THIS exhaustive note by Mr Stokes has been prepared under my instructions in reply to the reference to the Legislative Department directed by the Council generally, and also in reply to the reference from the Financial Department as to the liabilities of Government as shareholder in the Presidency Town Banks I have no remark to make, except that I do not consider the question as to the power of the Governor General in Council to create a corporation aggregate of any importance, if, as I suspect is the case, the Charter of the Bank of Bengal, dated 29th May, 1823, is a Charter of incorporation granted by the Crown The doubt as to the power attaches only to the Governor General in Council in his executive capacity, and not at all to the Governor General in Council in legislative capacity, provided only that apt language is employed in legislation But, as all the language of the Indian enactments regarding the Bank of Bengal leads up to, and refers to, the Charter of 1823, then if that Charter be from the Crown, it is dated at a period when the Crown had not the power to create a corporation aggregate *otherwise than with limited liability*, and consequently all the phraseology of the Indian enactments would necessarily be taken as implying limited liability Further, I think the language of the enactments as to the Bank of Bengal would govern that employed in the enactments relating to the Banks of Madras and Bombay

More recently than 1823 the Crown has had conferred on it by Parliament the power of creating corporations aggregate for banking with a liability limited to more than the amount of the shares

Whether in fact the Charter of 1823 is a Charter by the King we have no facilities in the Legislative Department for ascertaining, but doubtless the Financial Department has the means of learning. But, even if the Governor General in Council affected at that date to grant a Charter of incorporation, I agree with Mr Stokes that the grant was valid, especially at

a time when legislative and executive functions were blended in India

Note by Mr Whitley Stokes

Statute 39 & 40 Geo III, c 28, rendered all banking companies of more than six persons illegal the Bank of England alone being excepted The 7th Geo IV, c 46, rendered banking companies of more than six persons legal, provided they did not carry on business within 65 miles of London The 3rd & 4th Wm IV, c 98, enabled banking companies of more than six persons to carry on business within 65 miles of London, subject to certain restrictions The 7th & 8th Vict, c 113, conferred the privilege of suing and being sued upon banking companies of more than six members carrying on business within 65 miles of London and established before the 6th of May 1844 Such privilege was enjoyed under 7th Geo IV c 46, by banking companies carrying on business more than 65 miles from London 7 & 8 Vict, c 113 prohibited the formation, after the 6th of May, 1844 of banking companies of more than six persons, save under its provisions

This Act also authorised banking companies of more than six persons formed before the 6th of May, 1844 to obtain Charters of incorporation and so bring themselves within the provisions of the Act (section 45) The Joint Stock Banking Companies Act 1857 (20 & 21 Vict, c 49), required all banking companies formed under 7 & 8 Vict, c 113, to register, repealed that Act, prohibited the formation of banking companies of more than ten members, save under its own provisions, declared that the shares of banking companies formed anew must not be less than £100 each, and, lastly, conferred upon banking companies of not more than ten members the privileges previously enjoyed by banking firms of not more than six members The last enactment is preserved from repeal by the Companies Act of 1862

Until 1857 banking companies could not be formed by registration, and until the following year they could not be formed with limited liability, except by virtue of some special Act of Parliament or Royal Charter In 1857, however, an Act (20 & 21 Vict, c 49) was passed authorising companies of more than six members to register, and in 1858 another Act (21 & 22 Vict, c 91) was passed authorising them to register with limited liability companies, actually registered under these Acts, are subject to the provisions of the Companies Act of 1862 which also authorises the formation of new banking companies of more than six members with limited or unlimited liability

There may thus be five classes of banking companies in England—

(1) Ordinary banking partnerships of not more than ten members

(2) Companies of not more than six members, formed before the 6th May, 1844, and empowered to sue and be sued by public officers, but not registered

(3) Registered companies of more than six members Companies of this class may be limited or not

(4) Companies formed before the 6th May, 1844, and subsequently incorporated by Royal Charter, under 7 & 8 Vict, c 113, but not registered under any of the later Acts

(5) Companies formed under special Acts or Charters of their own

The above précis of the English *public* legislation on banking companies (it would be useless even if it were possible, to refer to all the *private* Acts on the subject) is very brief, but may be relied on as accurate, inasmuch as it is founded on a long and elaborate note in Mr Lindley's work on Partnership Law In England banking companies are now under precisely the same law as other companies, with the exception of the following special provisions —

(1) Limited banking companies are required to publish twice a year a statement of accounts in the form marked D in the first schedule to the Companies Act, 1862

(2) The Board of Trade may appoint inspectors to examine into the affairs of a banking company, whether limited or unlimited, that has a capital divided into shares, on the application of holders of one third of the shares

(3) No banking company issuing notes can acquire limited liability in respect of such issue

(4) Banking companies registering with limited liability are to give notice to their customers of their intention to register

In India the early legislation as to banking was, with the exception of the two Acts, XXIII of 1845 and III of 1849, relating to the extinct Union Bank, altogether confined to the three Presidency Towns Banks of Calcutta, Madras and Bombay The Bank of Bengal had a Charter dated the 29th of May, 1823, and under this Charter and the Acts relating thereto (Nos XIX of 1836, XXXIV of 1838 and VI of 1839, which last cancelled the Charter and repealed the former Acts), it appears to have been a body corporate, with all the rights, privileges and immunities of a corporation aggregate (see Act VI of 1839, section 2) The last mentioned Act, though amended by Act XXI of 1854, affected by Act XXVII of 1855, and untouched by Act VII of 1860, was repealed by Act IV of 1862, which, with Act XXIV of 1861 (as to managing Government currency notes), are the enactments now in force relating to this Bank Act IV of 1862, section 2, expressly declares that the present and future proprietors shall continue to be a body corporate In Madras there was, previous to the 1st of July, 1843, a Government Bank On that day, however, the Bank was abolished, and a new Bank was, with the approbation of the Board of Commissioners for the Affairs of India, incorporated by Act No IX of 1843 This Act, though untouched by Act VII of 1860, was repealed by the Madras Act, No V of 1862, which enactment is now in force It expressly declares in the 2nd section that the present and future proprietors of the Bank stock shall continue to be a body corporate, and to possess the aforesaid rights, privileges, and immunities

The Bank of Bombay was established in 1840, with the approbation of the Board of Commissioners for the Affairs of India, and the proprietors were incorporated by Act No III of 1840

The 1st section of that Act contains the usual declaration that the proprietors shall possess the rights, privileges and immunities of a corporation aggregate Act III of 1840 was repealed by the Bombay Act, X of 1863, the 2nd section of which enacts that the proprietors shall notwithstanding continue to be a corporation, with the rights, powers and immunities aforesaid

None of these Acts contain any express provision limiting the liability of the proprietors but, assuming that the Presidency Town Banks are duly created corporations, this appears to be immaterial, for, though the doctrine of unlimited liability applies at common law, not only to ordinary partnerships, but to unincorporated companies, it is clear that it does not extend to incorporated companies (Lindley, I 301) The rights and obligations of the body corporate are not exerciseable by, or enforceable against, the individual members, either jointly or separately, but only collectively as one fictitious whole *Si quid universitati debetur singulis non debetur, nec quod debet universitas singuli debent* A corporation, as such, has nothing except its funds to pay out of Where the whole of the capital has been subscribed and exhausted, the creditors of a corporation have no remedy, and where the whole capital has not been paid up, all that a Court of Equity will do is to compel the share holders rateably to pay up so much of the capital as has not been subscribed (Talbot's case, 5 DeG & S 386) It is therefore, in my opinion, perfectly clear that "in the event of the failure of any of the Presidency Banks, the Government (assuming Government to be a share holder) is not liable for the whole loss," but to the extent only of the amount (if any) unpaid on shares held by Government The question then arises—Has the Governor General in Council power to create corporations? If he has, he has clearly exercised it in the cases of the three Presidency Town Banks It is certain that the consent of the Crown is absolutely necessary to the erection of any corporation, but it is equally certain that such consent may be either express or implied It is also clear that the Crown may grant to a subject the power of erecting corporations, though it might perhaps be more accurate to say that the Crown may permit the subject to name the persons and powers of the corporation, and to regard the Crown as the erector, the subject as the instrument An illustration of the last proposition may be found in the case of the Chancellor of the University of Oxford, who has, as is well known, often exerted it in the establishment of companies of local tradesmen I have no knowledge of the exact extent of the powers expressly or impliedly delegated by the Crown to the Governor General in Council But I should be much surprised if the power to create corporations was not of them, especially as the British Parliament has in at least one instance recognised a corporation created by the Indian

Legislature (I refer to the Assam Tea Company, which was incorporated by Act No IV of 1855) The circumstance that in the cases of the Banks of Madras and Bombay, Acts of incorporation were passed by the Indian Legislature with the approbation of the Board of Commissioners for the Affairs of India, may also be regarded as evidence of the delegation of the power referred to

As regards the other Indian Banks, the earliest legislation that I find on the subject is contained in the 1st section of Act XIX of 1857, which follows its English prototype, 20 & 21 Vict, c 49, in prohibiting banking companies from being registered with limited liability This prohibition was, however, removed by Act VII of 1860, sect on 1, which for the first time enabled joint stock banking companies to be formed on the principle of limited liability This Act was repealed by the Indian Companies Act, X of 1866 but the power to form limited banking companies is of course continued by such Act So far as regards banking companies, the provisions of the Indian Companies Act are, with one exception, identical with those of the English Companies Act of 1862 But, as regards the examination of the affairs of a company by inspectors, the Indian Act does away with the distinction made by the English Statute between banking and other companies having a capital divided into shares In either case, under the Indian Act, inspectors may be appointed upon the application of members holding one-fifth of the shares The only distinctions *in India* between banking and other companies are (1) that the former are, as in England, required to publish twice a year a statement of accounts, and (2) that, before registering with limited liability, they must give notice to their customers of their intention to register

Indian Companies Act, section 44—see the form of the statement, marked D in the first Schedule to the Act

Indian Companies Act, section 202.

This note not only answers (see the last preceding paragraph) Mr Massey's question as to the state of the law regarding the necessity of furnishing periodical accounts of joint stock banks but also deals with the much larger subjects mooted by Mr Maine in his note (put up) of the 18th instant

(*See No 94*)

No 48

Appellate Benches, Act XXIII of 1867

(*11th September, 1866*)

It appears to me that the modifications in the draft Bill suggested by the Punjab Government amount to little less than a proposal to suspend all regular law throughout the Punjab in a very large number of cases of murder and attempted murder A Committee is to be formed consisting either of the Commissioner, Deputy Commissioner and a Native Magistrate, or of the Deputy Commissioner, a Native Magistrate, and some Europeans This Committee is to be a veritable Committee of Public Safety It is to be established all over the Punjab, for the Lieutenant-Governor objects to the limitation to particular districts, and is to be empowered to try without appeal and summarily execute all persons charged with murder or attempted murder from "religious" or "political" motives And the Chief Court adds, with some simplicity, that, as enquiry into motives is difficult, it should be dispensed with, and the Court should be empowered to take up any case of murder or of attempt to murder

Proceedings, Foreign Department, Judicial, March, 1867, Nos 12 14.

No proposal could differ more widely from that embodied in the draft Bill. The latter was limited as closely as possible to the special class of outrages which had called it forth It innovated as slightly as possible on the general law of the country, and it afforded a tolerable barrier against the effect of panic or rage But the Punjab scheme is not even confined to outrages by a member of one sect or a member of another. It sets all law aside, for our Code of Criminal Procedure has no application to such a Court and system as this. And, further, it seems to me to afford no security against wholesale and hasty executions Let us suppose an attempt to have succeeded, such as that which recently failed in the Punjab Let us *assume* a fanatic to have murdered a young and well-known European lady of position Nobody could object to any summary procedure being brought to bear against the murderer But, in the panic and general indignation which would follow, what chance would persons charged with murder or attempted murder have for the next twelve months? As the Committee is, I presume, to decide by majority, the concurrence of two Europeans would be enough for a sentence of death. Moreover, it is to try, not only murders, but *attempts to murder*—a class of offences so various in their nature that, although some of them undoubtedly merit the penalty of death, the framers of the Penal Code were obviously unwilling to trust the task of discrimination to unlearned Judges and declined therefore to make them capital crimes in India

It is true the Court is only to have jurisdiction when the crime has been committed from religious or political motives The Judges of the Chief Court are, as it seems to me, quite right in saying that the enquiry into such motives is very difficult, though certainly I do not agree with the proposal which the Court builds on the remark The Lieutenant-Governor indeed makes the (to me) extraordinary observation that nothing is easier than to determine religious and political motives! I am not quite sure that I myself understand what a "political" motive is, but at all events His Honour's remark can only be true of unmixed motives But the real difficulty, and the real chance of injustice, occur in respect of *mixed* motives Suppose a Mahomedan has a grudge against a Hindoo and attempts to kill him Will not the grudge have inevitably been intensified by the difference of religion, and will not the man be almost sure to have used language which can be construed into evidence of religious motive? Again, if a Mahomedan or Hindoo makes a murderous attack on a European, are not "political" motives pretty sure to have supervened on the original intention, whatever were its character at first?

The proposal emanates, I presume, from Mr. Justice Roberts, since it bears traces of a panacea against the Indian appeal system which he has several times placed before the public.

He proposes to save appeals by making all, or nearly all, the present Judges of First Instance and of Appeal sit together and decide finally by a collective judgment The fallacy lies in the assumption that several weak Judges grouped together will make a strong Court So far from the Court being strengthened, I have always maintained that it would probably be weakened through the weakening of the sense of responsibility which is felt by a Judge sitting alone I know but one way of strengthening a Court and that is by improving the individual members

Rather than legislate such a plan, it would be much better, I think to follow Colonel Becher's advice and to have no new law at all but to leave these outrages to be dealt with extra-legally as they arise The Government would always support one of its officers in a case where summary procedure was justifiable, and he would not be likely, through the want of a law, to put it in force rashly Indeed, it will now be very difficult to carry a measure based on the draft Bill, unless the Punjab Government should alter its mind for these papers must in fairness be laid before the Legislative Council

No 49

Bengal Cantonment, Contagious Diseases

(1st October, 1866)

The necessity of overawing a city like Benares is no doubt a serious political consideration, although it seems to me to have lost importance of late But it is admitted that nothing would prevent the new cantonment from being as efficient in this respect as the old one, except the want of a permanent bridge Now, taking the minor alternative of a bridge-of-boats, I must say that, quite independently of this discussion, I have often thought it not very creditable to the Government, and not very just to such a community as that of Benares, that no serious effort is made to maintain such a bridge throughout the rainy season, as is done elsewhere under more difficult conditions If the communication between the city and the railway station, even now imperatively demanded, were permanently established, I concur with the Commander-in-Chief in thinking that there would be considerable advantage in keeping the troops somewhat apart, and leaving the general control of the city to the civil authorities and the police It appears to me, after reading the analysis of the statistics by Dr Beatson and Sir W Mansfield's account of His Excellency's personal experience and observation, that the sanitary arguments against retaining the present cantonment are really conclusive I cannot agree with Mr Grey that, with such information before us, fresh enquiry is needed What completer conditions of unhealthiness in a cantonment can be united than in a site saturated with ordure, difficult of drainage, and in close proximity to large native bazars? It is true that His Excellency the Governor General reminds us that bazars have always grown up in the neighbourhood of cantonments But in a new cantonment the Government can control the mode of their growth and the nature of their influence, and, with a view to the due exercise of that control, we have more sanitary knowledge at our command and more legal power in our hands than had our predecessors It will be our own fault if the disease, which is the great scourge of our troops, is not, by proper modes of prevention and cure, pretty nearly banished from a wholly new cantonment divided from the city by a river crossed by a single bridge

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No 50.

Army Act, 1881, s 170

(19th October, 1866)

My own personal belief is, that the three suits recently instituted by Captain Jervis against His Excellency Sir William Mansfield, for money due on a building account, for a general balance of account, and for defam-

Proceedings Military Department, November, 1866, Nos 60-61

ation, were wholly frivolous and vexatious, and that they were intended partly to prevent an exercise of military authority (which indeed was the reason assigned for their withdrawal), and partly to give colour to certain allegations made by the plaintiff in his defence before the court-martial which has just closed its sittings I know as a fact that the documents filed in those suits contained many statements falling under the grossest forms of what is technically known to English lawyers as "scandal and impertinence" Further, I feel very strongly the force of some of His Excellency's general remarks on the injury which may result to military discipline from abuse of the machinery of the Civil Courts The risk of such abuse appears to me to be growing in India, and I admit it to be a risk with which Commanding Officers are little able to cope, and against which they ought not to be called upon to struggle

It is therefore with some regret that I feel myself compelled to say that the plan submitted to us by His Excellency is, in my judgment, impracticable

His Excellency suggests that "the Commanders-in-chief of the several Presidencies and Commanding Officers generally shall not be liable to be sued by officers on the full pay of Her Majesty's service serving in India, or by officers on half pay employed on the staff, or by Warrant Officers, Native Officers, Non-Commissioned Officers and Soldiers, British and Native, and subordinates attached to the staff or regiments who may not be enlisted under the command of the said Commander-in-Chief or Commanding Officer" I imagine that, though His Excellency does not distinctly suggest this, he would consider that a necessary supplement to his scheme would be some formally organized body, a Court of Honour or Equity, to which the disputes which the Civil Courts would be prohibited from entertaining might be referred

This proposal falls in with what is no doubt the popular idea of litigation, that it involves a plaintiff and defendant distinctly opposed to one another, and also that it involves a contest in which there is some clear moral right on one side or the other But it may safely be asserted that probably the largest, and certainly the most important, kinds of litigation do not present these characteristics In the great majority of the cases tried by Civil Courts on their Equity side, and in the exercise of the extraordinary jurisdictions conferred on them by statute, there are either no plaintiffs and no defendants, or the parties are arranged as plaintiffs and defendants according to technical rules which do not always or generally represent their real antagonism Now, it is indisputable that every contentious proceeding may be incidentally and occasionally employed by an unscrupulous opponent to prevent an exercise of military authority, just as two of the suits in which Sir W Mansfield was made defendant had not apparently upon the face of them any

connection with his position as head of the army in India. Hence, in order fully to carry out His Excellency's proposal, it would be necessary to prohibit by very sweeping provisions all litigious disputes between Commanding Officers and their subordinates. Very great and very far-reaching injustice would, however, be the probable result. If a Colonel and a Lieutenant have the misfortune to be shareholders in an Insolvent Joint Stock Company, it would seem highly unreasonable to prevent the subaltern from seeking to bring his Commanding Officer on the list of contributors. Again, in the class of cases which occupy most of the time of Equity Courts—disputes on doubtful wills—a subordinate who happened to be residuary legatee could not justly be precluded from trying to avoid an ambiguous specific bequest to his Commanding Officer. Yet it would be hardly possible to use legislative language at once sufficiently general, and yet not pregnant with these consequences. Nor would the injustice probably be confined to the officers or others to whom litigation was expressly forbidden. A sweeping statutory prohibition of litigation between persons belonging to a particular class would have extensive effect in vitiating judicial proceedings, and might compromise the interests of many who are wholly beyond the sphere of military discipline.

I feel sure, moreover, that His Excellency's proposal would work considerable and very unnecessary injustice, even were it confined to that class of cases in which there is a distinct issue between plaintiff and defendant. A very simple example is that of a dispute respecting the purchase or joint occupation of a house.

I know no more difficult questions of land-law than those which, in the absence of a Civil Code, are likely to arise concerning immoveable property in the Indian Mofussil and it would be very unfair to compel military men to submit such questions, which constantly involve neither moral right nor moral wrong to a Court whose decision would be a business of guesswork. The risk of injustice would hardly be less in the application of His Excellency's scheme to the class of disputes which are probably more immediately in his mind—disputes on contracts. One of the suits recently brought against His Excellency hinged upon a building contract: and it happened that the contract was one which should have put the plaintiff out of Court at once. But building contracts as a class are notoriously difficult to construe and so are most contracts which are not framed by experts, but drawn up by the agreeing parties themselves, and this I presume, is the usual practice in India.

If I am right in supposing that a necessary part of His Excellency's plan would be a Court of Honour with some sort of formal organization, I am convinced its working would be unsatisfactory. My experience of unlearned tribunals is that they either decide at haphazard, or are ultra technical. If it should be sought to neutralize these defects by allowing advocates to

be heard by the Court (and I really do not see how they could be kept out), it seems to me that the very liability of Commanding Officers to annoyance of which His Excellency complains, and which I concur with him in thinking a great evil would be very likely to be reproduced and in a far more embarrassing form.

Since, however, I have admitted the evil to which His Excellency's Minute call attention to be both serious and increasing, it would be very improper in me if I did not endeavour to discover and point out some expedient by which it may be mitigated, if not removed. And here it is important to enquire what the actual state of the law is as to the civil liability of Commanding Officers.

The law of England, which the Indian Courts would (until a Civil Code provides otherwise) certainly apply to such cases, has long been that an officer is not civilly liable for acts done in the exercise of military authority. But the rule was until lately supposed to be subject to the qualification that the acts must not have been done *maliciously*, and so it was laid down in an opinion recently received from the Advocate General. The loophole was dangerous as letting in an enquiry as to motives. But Mr. Cowie had probably not observed that within the last few months the supposed qualification had been removed by a dictum of a learned Judge. Mr. Justice Willes, one of the ablest and most authoritative lawyers on the English Bench, has publicly laid down that if, in an action before him against an officer for alleged improper exercise of military authority, there should be evidence of malicious intent, he should still, if the act were shown to be military, direct the jury to find a verdict for the defendant. I cannot doubt that the strong and pointed language in which this dictum was clothed was expressly intended to reassure military officers in England, who have recently been much harassed by litigation such as that of which His Excellency complains. The law has therefore now for its basis the doctrine that every military man has bound himself by a "peculiar contract," to use Mr. Justice Willes's expression, which absolutely confines him to military remedies for the redress of military wrongs.

Such is the law. Recourse to the Courts is not absolutely barred, for there may still be an enquiry whether the act complained of was really done in the exercise of military authority, but if the act is shown to have been, or to have purported to be, military, the principle of decision is now clear. It may, however, be said that the very power of suing may be used as an engine of annoyance, since the real object of the suit may be disguised until the judicial enquiry above mentioned has revealed its true character, and since scandalous and defamatory matter may be introduced into the pleadings. I allow that officers may be temporarily harassed by the first expedient

though it is one of which the consequences must always be ultimately serious to the plaintiff, but the second is one little to be feared under a well-arranged system of administering civil justice

There is no offence against itself which a Court, sensible of its duty and dignity, so deeply resents, and none which so prepossesses it against a plaintiff, as the attempt to employ its procedure to inflict collateral injury on a defendant It does not appear to me that the rules of procedure observed by Indian Courts, if such rules be considered by themselves, give defendants less protection against such injury than do the analogous rules followed in England Section 124 of the Code of Civil Procedure gives the Court a very large power of rejecting any "written statement" (which is the part of the pleadings into which scandalous allegations would be foisted) if it shall be of opinion that the statement contains "matter irrelevant to the suit," and, when such rejection has taken place, the party cannot present a fresh written statement without the express permission of the Judge No doubt, the Judge would allow any allegation, even if *primâ facie* scandalous, to be retained, which the plaintiff affirmed to be true and essential to the merits of his case But, in so affirming, the plaintiff would bring himself under the provisions of section 24, which imposes the penalties of fabricating false evidence on everybody who includes in a written statement averments "which he knows or believes to be false, or which he does not know or believe to be true"

Let us suppose the three suits instituted against Sir William Mansfield to have been brought before a Court fully conscious of its own responsibilities. The suit for defamation of character was one of which, as the Advocate General has remarked, very short work would have been made It amounted in a lawyer's eyes to the legal monstrosity of a suit for alleged defamation in which the plaintiff, while he distinctly defamed the defendant, omitted to set forth the defamatory matter of which he himself complained Whether such a suit ought to have been received at all I am unable to say, since I am unfamiliar with the procedure which obtained in the Punjab before the introduction of the Code a few weeks ago But I cannot imagine that Mr Cowie was wrong in supposing that it would have been the duty of any Court to take it off the file on the motion of the defendant, and thus the plaintiff would, at the very least, have been under the necessity of paying twice over his very heavy stamps and tulubana As to the other two suits, there was nothing in their ostensible object to prevent their being tried in regular course, but a competent Court would have caused any scandalous matter to be removed, and the very attempt to introduce such matter would inevitably have led it to view the whole litigation with suspicion, to watch it carefully, and to sanction all reasonable steps for bringing it promptly to a close.

Whence, then, arises the peculiar risk of annoyance to which I admit that military officers in India are exposed? I think it arises from the weakness of the inferior Civil Courts in the Mofussil I hope I am not using language of unnecessary disparagement I am not speaking of want of ability in the officers presiding over those Courts, or even of want of judicial ability I refer to a certain lack of moral firmness which I hear of in all quarters The source of the defect, which perhaps may one day disappear, is not far to seek There has of late been a great spread of advocacy over India, and the lower Courts have not yet fully learned (though some have learned more than others) to curb the excesses into which it is sure to fall unless controlled either by the firm hand of a Judge, or by the stern rules which govern the practice of the English Bar It is hardly wonderful that an Indian Mofussil advocate should not only permit himself in Court a license with which even the vulgarest notions of an English barrister's liberty have no sort of correspondence, but should occasionally not hesitate to defend his own case and attack that of his opponent in the newspapers, when one considers that he is guided by no definite code of practice, and that he has almost invariably a pecuniary interest in the result of his case At all events a great amount of concurrent testimony has for some time past been reaching me that Indian Civil Courts (apart from the High and Chief Courts) are to a pitiable degree at the mercy of sophistry and effrontery and are most unduly sensitive to the public opinion brought to bear on them from outside Such defects must obviously, and very seriously, diminish those safeguards against the abuse of Civil Procedure which I have described above, while they add opportunities of annoyance which would never be found in proceedings before a strong and firm Judge And then, beyond all this, there is that vast machinery of appeal which presses on the litigant throughout India, but nowhere so heavily as in the Punjab, and which, essential as it may be to the dispensation of justice in the ordinary run of cases, would almost seem carefully framed to arm a deliberately vexatious litigant with a hundredfold power of vexation

The liability of military men to this special danger has obviously attracted the attention of the framers of the Mutiny Act, since it can hardly be doubted that section 88 (of the Act of 1865) is directed against it, and I think that it is only through an accident that the provision has failed of effect The section in its last clause provides that "every action against any person for anything done in pursuance of this Act (which includes all Mutiny Acts, all lawful military action depending on the Mutiny Acts or on articles made under them) shall be brought in some one of the Courts of Record at Westminster or in Dublin, *or in India*, or in the Court of Session in Scotland" This expression, "Court of Record," applied to the Courts of Westminster

and Dublin, practically confines the power of suit to the highest tribunals in the country, and I am inclined to suspect that the framers of the section supposed that it would have analogous effect in India, and that the actions referred to were only intended to be brought in the old Supreme Court or present High Courts I entertain this suspicion the more strongly because, in certain former states of the law in India, I much doubt whether an Indian Mofussil Court would have been held to be a Court of Record. But now the better opinion, grounded on technical reasons on which it is unnecessary to dilate, is that every Civil Court in India, even a Small Cause Court, is a Court of Record

The very simple proposal, therefore, which I now make is that we attempt to have effect given to what I cannot doubt is the general intention of this section, whether I am right or wrong as to its special intention I suggest that the Secretary of State be moved to obtain through the War Office such an alteration of the 88th section of the Mutiny Act as will place Commanding Officers in India on the same footing in respect of civil liability for acts done in the exercise of military authority as Commanding Officers serving in England, Ireland or Scotland Under the amended section, actions of the kind which the section defines, founded on a cause of action arising in the parts of India possessing a High Court established by the Queen's Letters Patent, or a Chief Court, or a Recorder's Court, would only be brought to such Court, but, as the High Court of the North-Western Provinces and the Chief Court of the Punjab have no ordinary original jurisdiction, it would be necessary to introduce words giving them such jurisdiction for the purpose of trying such actions, and it must further be provided that, if a suit against a Commanding Officer be instituted in a Court subordinate to the High or Chief Court and a *primâ facie* case be made out that such suit is brought on an act done in the exercise of military authority, it shall be the duty of the High or Chief Court to transfer the case and try it as a Court of Extraordinary Original Jurisdiction

Such provisions would not apply to provinces in which there is no High Court or Chief Court or Recorder's Court, and thus, if the legislative change were to be absolutely complete, such territories as Oude, the Central Provinces, Scinde, &c, would have to be brought under the jurisdiction of High or Chief Courts to the extent necessary for trying such suits, but I think it would be better to avoid this complication, and, in the territories just mentioned, to leave the law as it stands Even thus the evil to which our attention has been directed, and which I think very formidable, would be very sensibly mitigated

If my colleagues assent to the proposed amendment, I will prepare in the Legislative Department a clause which will carry out the intention I have indicated, and which can be at once added to section 88 of the Mutiny Bill of 1867

No 51.

PRINSEP'S PUNJAB THEORIES

(26th October, 1866)

THIS is, I must say, one of those proposals which are calculated to drive to despair any Member of the Government of India who has joined that Government straight from England The facts are these —Eighteen or nineteen years ago the settlement of the land-revenue of the Punjab, then just brought under British rule, was effected, and, as is usual in India, the status of the various classes of proprietors, sub proprietors and tenants was ascertained Within the last two years Mr Prinsep, the Punjab Settlement Commissioner, has had a sort of roving commission under which he has assembled juries, if they may so be called, of the cultivating classes, and by their help he conceives himself to have discovered that serious mistakes were made in the recording of rights at the last settlement Colonel Lake, however, the Financial Commissioner, who appears to have gone over the same ground with Mr Prinsep, questions some of his most important results The Lieutenant-Governor, Sir D Macleod, differs in some particulars both from Mr Prinsep and Colonel Lake. The Viceroy dissents to some extent from all three, and so does the Foreign Secretary, Mr Muir Now, we know that nobody connected with the Government has had experience of the country, as regards actual contact with the land and commerce with the people, which can be compared with that of Mr Muir and the Governor General Sir D Macleod—I quote Mr Grey—"has studied and observed the Natives of India with more acuteness and accuracy probably than most public men in this country" Mr Prinsep "possesses special qualifications" for his enquiry. Colonel Lake finally is described by the Lieutenant-Governor as "the most thoughtful perhaps, and free from prejudices, of all the officers who have adorned this administration" I do not in the least deny the justice of these compliments, but I need scarcely point out the difficulties they place in the way of those who must decide the point mainly by evidence and authority

[1] Proceedings, Foreign Department, Revenue, A, May, 1867, Nos 6 15

There is further this element of suspicion—of course I do not use the word in any injurious sense—which pervades the materials for an opinion The old settlement reflected the ideas on the subject of property and tenant right which were then all but universal in India, and which nobody of much credit denied Mr Prinsep's discoveries, on the other hand, and the proposals of Sir D Macleod, fall in with the views which have recently become prevalent, which have the support of the great European interests in Lower Bengal, and which have been advocated of

late with so much tenacity and vigour by Sir C. Wingfield in Oude The accusation that an opponent is governed by theory and sees the facts through the prejudices which that theory creates, is common to both schools But this is not all Sir D Macleod tells us that "the state of things existing in the Punjab for a long series of years preceding annexation was such as almost to extinguish proprietary rights in land, or at all events to deprive them of nearly all their value The people in consequence possessed but very indistinct ideas in regard to these rights, so that the best security for a correct ascertainment of the rights and relations of the several classes connected with the land is wanting" The same statement, with fewer qualifications, is repeated several times by the subordinate officers whose opinions appear in the papers. The truth appears to be that, when Mr Prinsep proposes to redistribute these rights, he proposes to redistribute something which is exclusively the product of British rule in the Punjab The rights are nothing without the enjoyment which they carry with them, and this enjoyment it is proposed to take away from somebody who now has it, and to give it to somebody else When I was in the Punjab in 1864, a very high authority told me that, whenever he questioned a person of the Sikh cultivating classes about rights of property previous to annexation, the answer was, "Why do you ask me such a question? It is you who have created property" Yet, if British rule created the property, I cannot see that it has very deeply sinned if it decided somewhat arbitrarily who was to have it I should say that we should commit an injustice far more deeply felt if we took it away from those who have enjoyed it for fifteen or twenty years—no very short period, as compared with the whole duration of British empire in India The transfer of property has, moreover, to be effected in the face of Colonel Lake's statement that when he followed in Mr Prinsep's footsteps he found nobody discontented with existing arrangements Colonel Lake further remarks—and this is exactly what I should have expected—that the European officer appeared to have been a good deal more interested in the enquiry than the people themselves While, then, I concur with Colonel Durand in thinking that the existing arrangements should not be disturbed, I cannot agree with him in attaching any extraordinary importance to Mr Prinsep's results What, in fact, did Mr. Prinsep do? He interrogated a number of very ignorant men about some most intricate rights which are admitted to have been in abeyance for 15, 18 or 19 years, and which, if they existed, are admitted to have had no value No doubt the poor and ignorant of all countries are occasionally the best authorities on matters of usage and custom, but this is on condition that the usage and custom are of practical interest to them, and mixed up with their every-day life An English agricultural labourer

sometime evinces a singular knowledge of his rights under the Law of Pauper Settlement, which is by no means an easy branch of English law, but he certainly could never state what the law on the subject was twenty years ago Yet the Law of Pauper Settlement has been, through all his life, I am sorry to say, a subject of the utmost moment to the English labourer

Nobody brought to India a stronger conviction than I did of the policy of abandoning all English or European generalizations in India, and of respecting native usage even though it should be unreasonable And if there was one class of usages which I should have supposed more deserving of respect than another, it was the custom which constitutes the tenure of land But, while nothing seems to me to exceed the tenacity of the Natives of India in adhering to personal, family and religious usages, and to those customs of holding property which are closely implicated with family relations, such as joint ownership and joint occupation, I must say that I have come to the conclusion, however presumptuous it may be, that there is a vast deal less of actual custom regulating the tenure of land by the cultivating classes than the large assumptions of the Indian Revenue Law on the subject of custom would lead one to suppose If, indeed, the Native Governments which we succeeded were such that their indiscriminate taxation made no practical distinction possible between rents and imposts, property and tenancy, beneficial occupancy and rack-rent, indistinctness of usage would seem to be the natural result of their system I do not indeed impute to any of the schools of Indian administrators, which have affirmed the possibility of discovering native usage on all subjects, that they are merely theorizing gratuitously,—least of all to that school which asserts that ownership is everywhere in India limited by beneficial occupancy,—because such a theory could by no possibility have suggested itself to a person under the dominion of merely European ideas and experiences, but I must say that there is now great reason to believe that the doctrines of all schools are founded on partial observation, and that it is the indistinctness of usage throughout India, taken as a whole, which has tempted and enabled the partizans of each school in turn to attribute to its principles this character of universality At all events this is the only way in which the conflict of authority can be explained consistently with the reputation of the disputants I will even assert the necessity of this explanation in interpreting the evidence which the Oude enquiry produced However conclusive it may seem to be, I cannot forget that my late colleague, Sir H Harington, served in a district of the North-Western Provinces just severed from Oude, and he steadfastly maintained that he had found beneficial rights of occupancy existing there And I doubt whether I ever knew a man more careful in detail and patient in observation than Sir H Harington

In the existing state of authority and opinion I can see no rule to follow, except to abide by actual arrangements, whether founded or not on an original misconstruction of native usage I say, *let us stand even by our mistakes It is better than perpetual meddling* I am therefore entirely opposed to the present proposals, and also to the amendments of Act X of 1859 proposed by Mr. Muir And nobody would have opposed more strongly than I any disturbance of Lord Canning's talookdaree arrangements in Oude, if only I could have persuaded myself that I understood what Lord Canning intended in respect of tenant-right and sub-proprietary right

I must add that I do not admit the correctness of many of Sir D Macleod's remarks as to the analogy between beneficial occupancy and English copyhold There is not the smallest reason for believing that copyhold was an objectionable form of tenure so long as the copyholders were for the most part actual cultivators of the soil, on the contrary, I venture to say that, in the legal or general literature of 150 years since, it will be found spoken of invariably with respect. But the great rise in the value of land at the end of the last century caused even land of copyhold tenure to become a merchantable commodity, and no doubt the incidents of the tenure are such as to render copyholds an inconvenient investment or form of property Though property in the Punjab is very different from what it was under the Sikh rule, it would be absurd to compare it with landed property in England If the machinery of the Copyhold Commission, which, I should observe, is very cumbrous and tedious, and very little applicable to India, is to be employed anywhere for the extinction of tenant-right, it ought to be first employed in Lower Bengal, where, owing to the existence of great capitalist industries, there really are strong reasons for rendering land as marketable as possible, but it seems to me pedantry to apply it to the Punjab

If beneficial occupancy in the Punjab, as it exists at the present moment, is to be abolished or limited at all, such abolition or limitation can only be justified on Mr Prinsep's grounds But I should feel much safer in applying the most sweeping theory of the great European thinkers on political economy, or the most hurried generalization of great Indian administrators, than in acting on the opinion of ignorant and puzzled peasants on difficult questions in which they have never had a practical interest We may at all events be sure that, amid the accumulated wealth which is the product of the peace and security flowing from our rule, all classes connected with the soil are immeasurably better off than they were under Native Governments, and are more than compensated for any errors we may have committed in the mere adjustment of their mutual rights

(*See No 57*)

No 52

COURTS OF SMALL CAUSES, STAMPS, BANGALORE

(30th October, 1866)

The justification for retaining a different system in the Presidency-towns is that there the Small Cause Courts are in the immediate vicinity of the High Courts, and are practically much influenced by that vicinity, that they are attended by a fairly competent class of advocates, and that they are carefully watched both by the Press and public If, however, any change were to take place, it is much more likely to be the introduction of the Mofussil Small Cause Court Act into the Presidency-towns than the converse step, and, indeed, the Calcutta Court was recently prepared to adopt nearly the whole of the Mofussil law

In the same way the objection of the Judges to the Stamp Law is an objection to the whole system In every such system there must be leaps, as there never could be stamps of all amounts But in spite of this disadvantage the system has so

many recommendations that it is proposed to introduce it into the High Courts under the revised Code of Procedure

If I had not reason to believe that those Judges were really competent and were giving satisfaction, I would even now advise the Government to force the Mofussil Act on the Court. But, as I believe the Bangalore Court to be a good one, and as in the course of three-and-a-half years the Court has no doubt suited itself to the community, and the community to the Court, and as, without question, a change forced on unwilling Judges would really make the Court and its establishment more dilatory and expensive, I am, on the whole, inclined to allow the Judges to retain their rules But, in making, on the objections of the Judges, the remarks at the beginning of this note, I would express the great regret of the Governor General in Council that a change, in itself desirable, has been frustrated by inexcusable delay in answering a reference, and I would remind the Judicial Commissioner that, as he has taken on himself the responsibility of recommending the retention of a state of things which, in fact, relieves the Court from all supervision, he must be additionally careful in watching it, and in assuring himself that it satisfies the public sense of justice

I would add that the introduction of Act XI of 1865 must not be considered as altogether set aside, and that in particular eventualities the Government may see fit to substitute it for the Court's present rules

I would accede to the suggestion that section 20 (not 23) of Act XI of 1865 should be extended to the Court The objections which I felt in June, 1863, have been removed by later legislation

(*See No 9*)

No 53

IRRIGATION WORKS AND GUARANTEED AND STATE RAILWAYS

(*8th November, 1866*)

Proceedings, Public Works Department, Railway, January, 1867, Nos 18-37

IN expressing my full concurrence with Sir William Mansfield's conclusion that irrigation works should be constructed by the Government, while railways should be committed to the enterprise of joint-stock companies, I may be permitted to say that I do so on the distinct assumption that the permission recently accorded to us by the Secretary of State, to raise a loan for works of irrigation, will not be withdrawn or seriously modified

2 I make this reservation because I cannot but feel that the effect of the last discussion which took place, as to the agency to be employed in creating and extending irrigational works, has been to expose the Government of India to much misconstruction Almost exactly three years ago, there being about three millions sterling to spare from the cash balances, and the Home Government having sanctioned the expenditure of part of the surplus in reproductive public works, the late Earl of Elgin initiated a discussion on the question whether works of irrigation were best committed to the agency of Government or to that of joint-stock companies The conclusion of the whole Government of India, as then constituted, with the qualified exception of Sir Charles Trevelyan, coincided with that of all the Members of the Government of Bombay, of our most experienced Engineer and Revenue Officers, and Lord Elgin's successor, in giving the preference to Government agency. But shortly afterwards the excess of the cash balance was diverted to another purpose I am not for a moment disputing the wisdom of the measure from a financial point of view, but the English criticisms, elicited by the deplorable famine in Orissa, show that our character has seriously suffered by it A discussion, having an eminently practical object—a discussion of the class of public works to which a considerable fund ready in hand had best be devoted—has assumed the appearance of a purely speculative controversy, begun in the face of dangers which are always imminent in India, and, possibly, intended as a pretext to cover carelessness or irresolution It is, therefore, most important to us that the financial point should be taken as settled once for all

3 Making, then, the above assumption, and, further, making the admission that it would be almost criminal to reject the agency of joint-stock companies, unless we are prepared to direct all our energies to the prompt construction of irrigational works, I adhere to the opinion that this class of public works is the last which the Government should allow to pass out of its own hands I have carefully read all that has been written in India in condemnation of the conclusion arrived at by Government, but the fairest of the adverse criticisms directed against it seem rather to strengthen it than otherwise It being admitted that the dangers indicated in the Government Minutes are real and not imaginary, certain conditions in the contracts with the existing irrigation companies have been specified as neutralizing them. But these conditions seem to me exactly those which deprive the undertaking on which they are imposed of the characteristic advantages of private enterprise

4 With regard to the proposed extension of the Indian railways, the Minutes of the Viceroy, of the Governor of Bombay and of the Members of their respective Councils suggest several questions—at what pace, and in what order, the new railways

shall be made, whether they shall be constructed by the Government or by joint-stock companies, and, in the last alternative, whether they shall be committed to companies under the system of guaranteed interest or on any other principle

5 Putting aside for awhile the questions of pace and order, I fully adopt the opinion of the Commander-in-Chief that, of all public works, railways should be the first given up to joint-stock companies, *inasmuch as their agency is, in this case, not only* not inferior, but, on the whole, much superior to that of Government The considerations urged by His Excellency in his powerful Minute are, I think, nearly summed up in the proposition that money subscribed by a joint-stock company for the construction of a railway is carried to a separate account and never diverted from it Now, Governments are under peculiar temptations which render it extremely difficult for them to keep available funds to such an account, or to continue supplying fresh funds which may be carried to it—a point illustrated by the perpetual encroachments of European Governments on the sinking funds set apart for the extinction of their public debt. Everybody will agree that, abstractedly, there may always be emergencies which could justify Governments in appropriating to general purposes money borrowed for special objects, or in discontinuing loans for special ends with the view of borrowing for general purposes War in Europe, and mutiny in India, would always be considered such emergencies But, apart from such extreme cases there are many influences at work on a Government like this, which tend either to arrest the process of borrowing for railway construction, or, if borrowing be continued, to continue it for other objects One financier is eager to show a surplus, and, in his unwillingness to add to the annual charge for interest on debt, is easily persuaded that railways have gone far enough Another feels that a perpetually borrowing Government, whatever reasons it may assign for its policy, is never in good credit Or, again, some previously unknown or temporary cause may elevate a different class of public works into the importance which irrigation works have recently assumed, and the simplest way of meeting the sudden necessity will be the contraction of expenditure on railways No amount of determination in the Government, as constituted at any given time, no degree of positiveness in publicly stating an intention can afford such security for the prosecution and completion of a line of railway as is given by its concession to a company Every one of us will admit, I presume, that, but for public companies, we should not have had the present Indian railways, and there is much even in the present discussion which may lead us to doubt whether, if we undertake to construct the remaining lines, they will ever be constructed

6 It may be added that the moral effect of borrowing through companies, and borrowing directly for public works, is

by no means the same I believe that a good deal of harm is acknowledged to have been done to the East India Company, even before the Mutiny, by the accusation that it was a perpetually borrowing Government The defence made for it always was, that it borrowed for the purpose of investment in public works, but the apology, though true, did not exclude some degree of discredit On the other hand, the immense loans virtually raised for railways are not believed to have in any way affected the Company's credit

7 Of the disadvantages involved in committing railways to companies which His Excellency the Viceroy has noticed, one, — the extravagance of the system,—is exclusively owing to the peculiar operation of the guarantee The others, no doubt, have a real existence, but they are in course of abatement The sedulous efforts of the Viceroy himself have already done something, and will doubtless do more, to diminish the most intolerable evil of all, the ill-treatment of the native passengers Moreover, both this and other habitual breaches of the duty which the companies owe to the public will be committed with less impunity if the legislation contemplated at the coming sittings of the Council be carried through, and since the recent multiplication of the tribunals to which British railway servants are amenable

8 If it be settled that the agency of joint-stock companies is to be employed in constructing the new railways, it has yet to be decided whether the Government aid, which must undoubtedly be given to them, shall be given in the form of guaranteed interest or in any other shape The Secretary, Colonel Dickens, deprecates our entering into this question until the great mass of minutes and memoranda which has been written upon it has been critically examined But the contents of these papers will, I believe, be found to be nothing more than (1) illustrations of the characteristic inconvenience of the guarantee, the extravagance into which it tempts the companies, (2) a variety of schemes, of which our late Secretary, Colonel Strachey, was the chief author, for subsidizing, or otherwise assisting, the companies under such conditions as might be expected to remove the temptation to extravagant expenditure As to the first point, the fact of extravagance, there can be no question The security and the rate of dividend guaranteed being both better than could ordinarily be obtained in the market, it has been the interest of the existing railway companies to sink as much capital as possible in their lines It must be recollected, however, that, while these lines were in process of construction, none but the most sanguine of business men were clearly persuaded that, when opened, they could possibly earn more than the guaranteed interest. But the example of the Great Indian Peninsula, of the East Indian and of the Eastern Bengal Railways has now proved that this impression was unfounded, and

the prospect of ultimately earning a dividend higher than, and independent of, the Government guarantee, will henceforward prove an effective check on wastefulness as respects all lines carefully selected with a view to their commercial prospects No doubt, in the construction of such lines as that from Lahore to Peshawar,—lines in regard to which commercial profit is a secondary consideration,—there will still be risk of extravagance, and the utmost vigilance of Government, rendered more effectual through past experience, will be needed to restrain it Indeed, the line to Peshawar appears to be one of the few which Government might, perhaps, keep in its own hands, since the military and political objects for which it will chiefly be constructed are of a class not likely to lose their importance in the eyes of statesmen However this may be, it is certain that, if joint-stock companies are called on at all, it must be on the principle of guaranteed interest It will be found, I imagine, on Colonel Strachey's return to India, that nobody is more satisfied than he of the impracticability of all the plans, many of them displaying remarkable sagacity and ingenuity, which have been proposed as substitutes for the guarantee system No proposal which does not, to a certain extent, eliminate the speculative element in Indian undertakings is in the very least likely to find favour with the English money market, and whether the Government borrows directly, or through joint-stock companies, it will never attract English capital to India in large quantities, unless it offers the capitalist a certain minimum profit on his investment.

9 As regards the rate of speed at which the new railways should be constructed, the Bombay Government proposes to commence the Indus Junction line, and the line from Delhi to Guzerat, at once, and in each case, at both ends simultaneously, and it further lays down principles which would apparently justify the prompt commencement of all projected railways, at all events in Central and North-Western India There is so much in Sir Bartle Frere's Minute with which I entirely concur, that it is with some regret I feel myself compelled to join the Commander-in-Chief in lamenting that the picture of the capabilities of India, which we have received from Bombay, should, on the whole, be so greatly overcharged with colour It is quite true that the ingenious expedient to which Sir Bartle Frere has had recourse, of superposing on a part of the map of India outlines of the principal European countries, may convey to an English eye a juster idea than has, perhaps, been presented hitherto of the scale on which the Government of India works, but it is equally true that any contrivance which leads our countrymen at home to measure the wealth and productiveness of India, either by mere space, or even by space combined with density of population, is in a high degree delusive There are symbols which speak to the mind through the eye almost as vividly as coloured diagrams, and cer-

truly more truly. Such symbols are figures. Now, if the area sketched by Sir Bartle Frere be somewhat reduced, so as to include only the countries which will be served by the railway from Delhi to Guzerat, and so as to exclude the tracts to which the Indus line on the one side, and the line from Allahabad to Bombay on the other will be of principal importance, the space which will remain, and which will be nearly conterminous with the Native States of the north, will still be large enough to contain the largest of the European countries figured on the map. But the aggregate revenue of the European countries thus sketched cannot be much less than 300 million sterling, and the revenue of the very smallest and poorest of them is not less than ten millions. What is the revenue of the Indian territory contained in the outline which make the largest and richest of these European States look so insignificant? Probably nobody can tell it exact amount, but I am informed on very high authority, that it does not exceed three millions sterling. Nor is this all. Revenue in this case includes much which, in Europe, is rent, and it is further, in these particular countries, levied with a severity of which the least scrupulous European Government would be ashamed. I do not for a moment doubt that the Delhi and Guzerat Railway has a fair prospect of becoming profitable through the growing wealth and commerce of those parts of British India which it will open to the sea, but its prospects certainly cannot be measured by a mode of illustration which takes no account of the characteristics of India as a whole which Sir William Muir should be called to our recollection, and still less of those characteristics of these particular provinces which must always impede their advance in wealth—their comparative maldministration by the Governments to which they are subject.

It would be a not inconsiderable evil if, by unduly glowing descriptions of the capabilities of India, British capital were attracted hither in greater quantities than would admit of its returning a reasonably large and tolerably prompt return to the capitalist. Theoretically, no doubt, there is scarcely any limit to the amount of capital which may be bestowed in India with advantage to the country; but the results to the British dominion in India, and thus ultimately to the country, may be by no means of unmixed good. If private adventurers bring their capital to India, and are disappointed by the return, the immediate consequence is that the fault is laid at the doors of Government. Such complaints fructify in wide schemes for revolutionizing our system, which find an echo in England, and hence this Government which (type of conservatism though it appears to some persons) is really one of the most unstable in the world, through the rapid changes in its *personnel*, and through the alternate rise and fall of the conflicting doctrines of its great administrative schools, is still further disturbed by cruder theories of home manufacture. Should, however, this particular risk be averted by the Gover-n-

ment guaranteeing the capitalist a minimum return on his investment, the premium paid, if in excess, can only be supplied by over-taxation, the one injury which, next to outrage on their religious feelings, the people of India are likely actively to resent.

11 I entirely agree with the Commander-in-Chief that the true limits to the extension of our railway system are—first, the amount of capital the English money market is ready to supply at a reasonable rate, which is a question for the Secretary of State, and next, the amount which can be spared from our revenues, without over-taxation, for the payment of guaranteed interest, which is more especially a question for the Government of India. And I heartily join in His Excellency's wish that this last amount should no longer be left to fluctuate, but should be fixed at a permanent figure, until our railway system is completed.

12 Assuming that our available margin of revenue does not permit the simultaneous commencement of all the three lines before us, or even of two of them, the further question of the order in which they should be undertaken is one on which it would be presumptuous in me, with my comparatively limited knowledge of India, to offer a confident opinion But, if I were absolutely compelled to pronounce on the point, I am bound to say that I should concur with His Excellency the Viceroy rather than with the Commander-in-Chief As I understand it, the Lahore and Peshawar Railway is almost exclusively recommended by military and political reasons On the other hand, the importance of the Delhi and Guzerat line is chiefly, if not wholly, commercial At all events, until the Minute is received in which Sir R. Napier promises to maintain the contrary opinion, I think I may venture to make this assumption, supported as it is by the facts that the Princes whose territory the railway would pierce are peaceable and well disposed, and that there will shortly be railway communication between Bombay and North-Western India, through the western limb of the Great Indian Peninsula line But the Mooltan and Kotree line would appear to have, at the same moment, both great military and great commercial importance It is only second to the Lahore and Peshawar line in the addition it will make to the security of the North-Western Frontier, and it will connect with the sea, by an easy line of access, a series of provinces of which some are growing in wealth more rapidly than any other part of India, while nearly of all them, through their exclusive subjection to the British Government, possess a guarantee of progress which is wanting in most of the territory traversed by the railway which is to join Delhi with Guzerat While, therefore, I state my view with diffidence, I would place the three railways in the following order —

(1) Mooltan and Kotree
(2) Delhi and Guzerat
(3) Lahore and Peshawar

which the building is to stand has always been occupied during the cold weather, so long as I have known Calcutta, by the tents and boardings of the acrobat and the circus-rider, and if their place is taken by the opera-building it will be a gain in my opinion even in respect of clear space and fresh air The light one-storied structure of wood and iron which it is proposed to remove from Ballygunge to this No Man's land may be seen on its present site by anybody who chooses to visit it, and the question will be solved by going there how far it deserves the character of a permanent erection All I can say is we have a tolerable guarantee that it will not remain to the hot weather of 1868, in the certainty that if the attempt is made the first north-wester will dispose of it.

But, even if I thought that the prohibition of the Home Government had any application, I should feel no doubt of that Government's condoning its being set aside in the present instance

The time lost in writing Home would be fatal to the experiment which is being tried We owe the chance of obtaining an opera for Calcutta to a combination of circumstances never likely to occur again The reputation of Bombay for fabulous wealth and fabulous profusion brought for the first time to India a good second class Opera Company, the collapse of the prosperity of Bombay caused it to transfer itself to Calcutta Its success during the present cold weather has apparently been checked only by the distance of the only site which could be obtained for it from the populous parts of Calcutta. If the locality now proposed to be conceded to it produces larger audiences next year, it may be quite well left to shift for itself But if, on the other hand, the concession of the means of gratifying the real tastes of the population of Calcutta be denied to it or delayed, the Company will leave India at once, and we shall never see it or its like again

I do not admit that the experiment is solely to be judged by the expediency of encouraging a refined taste Much that is unhealthy in the moral and physical condition of the European community in Calcutta arises, I am convinced, from the fact that it is compelled to live a city-life in the tropics without any of the characteristic advantages which render city-life in any climate endurable No public amusement, except the very vulgarest, has ever in my time been offered to Calcutta For the sake of providing such relaxation as is now proffered to the community, I would, on sanitary grounds on political grounds, and indeed, on all grounds, run a far greater risk than has now to be encountered

Telegraphing to the Secretary of State seems to me out of the question The point in dispute is whether this is, or is not, an encroachment How can the material for a decision be conveyed in a telegram?

or indeed for pronouncing what should have originally been the correct, as distinguished from the mistaken, view Since I have been forced to direct my attention to this class of questions, the impression has been gradually growing on me that the founders of the great Indian systems of revenue trod on much more uncertain ground than they supposed, that, in enquiring what rights existed among the people previously to British rule, they paid too little attention to the confusion between right and power which exists in the minds of rude men, and much too little to that confusion between moral right and legal right which is not got rid of sometimes even by educated men Indeed, when one considers that a "right" in the proper sense of the term can only exist where there are regular laws administered by regular Courts, we cannot but see that nothing but approximations to rights can have been known in India, and it may reasonably be suspected that the ruder the people and the worse the Government, the more remote was the approximation If this opinion be presumptuous, I can only say that it appears to me the only mode of explaining the fact that men of the greatest knowledge of the country and of undoubted earnestness and good faith make positively contradictory statements on what ought to be matter of fact capable of being established by evidence, while enquiries conducted at intervals of fifteen or twenty years appear to give diametrically opposite results, and it is an indication pointing in the same direction that the permanent settlement of Bengal proper, which was an avowed imitation of English institutions, has proved to have more stability and has been less attacked and questioned than systems purporting to be based on the ancient customs and tenures of the people

While, then, we obviously cannot enter on the wide enquiry what system of landed rights is economically and socially best for a particular population, I think our proper course is as much as possible to adhere to the status we find existing Even if I thought that Mr Prinsep had the means of arriving at correct conclusions—which I do not, for the reasons I have given, and because any advantage arising from more careful enquiry was more than compensated by the lapse of time since the native rule—I should still object to his wholesale upsetting of British arrangements I think revolutions just as bad when effected on the pretext of retrogression as when effected under colour of advance and in this particular case all the value of the rights in question, if not the rights themselves, had been the creation of the British Government I think no such enquiry as this should have been opened, though, no doubt, complaints should have been listened to when voluntarily advanced The Oude enquiry was in my opinion justifiable, because it was unavoidable, everything turned on Lord Canning's guarantee to the various classes in Oude, and Lord Canning had guaranteed to the ryots

the rights they possessed at annexation What those rights were, amid absolutely contradictory statements from great authorities, it was plainly impossible to ascertain without asking what they were If it had not been for the peculiar position of the question, I should agree with an opinion I have seen expressed that the Oude enquiry, though proposed by myself, was a mistake. But for Mr Prinsep's investigation there was really no excuse except either a wish to prove his predecessors in the wrong, or at least curiosity to see whether they were right or wrong I may add that nobody should so strongly object to Mr Prinsep's proceedings as those who think the principles of the North-Western Settlement unsound For surely the objection always taken to that Settlement is that, instead of recognising standing rights, its authors wantonly disturbed the ground for the sake of disinterring buried and forgotten rights Such enquiries as Mr Prinsep's cannot be less objectionable, because the apparent result differs from that arrived at by the authors of the Settlement of the North West

Sir H Durand's plan of leaving all these questions to the Civil Courts is theoretically unexceptionable There being no distinction of person or principle between the judicial and revenue officers in the Punjab, what it would practically come to would be that each case would be examined into separately instead of the cases being disposed of in groups I fear, however, that the Punjab Courts, already overworked, would break down under the addition to their business, and thus we should be driven to legislate, just as the English Parliament, though unwilling to interfere with questions of ancient roads lights, &c, was forced by the number, difficulty and costliness of suits to lay down a rule in the Prescription Acts for the guidance of the Courts Moreover, the abandonment of these questions to the Civil Courts without legislation would scarcely work fairly in connection with a system of preliminary adjustment of rights by the Settlement Officer For, as I understand the matter, the effect of Mr Prinsep's proceedings is to oust some thousands of persons from the rights they have enjoyed for fifteen or twenty years, and to compel them, when he leaves the district, to go to the Civil Courts *as plaintiffs* with the burden of proof upon them But, if the adjudication is genuinely to rest with the Civil Courts, these persons ought to be *defendants* with the weighty juridical fact of possession in their favour Again, the result of his proceedings, if unchecked, will be to render quite insupportable the pressure upon the Civil Courts They might have disposed of questions of landed right if the system had always existed, but as it is, if there be no legislation, they will be flooded at once with some thousands of cases from each district settled by Mr Prinsep

I cannot conclude these remarks without saying that, even assuming Mr Prinsep to be thoroughly right in his results, it is

an occurrence of very disastrous omen for India that an officer, not placed under the responsibilities of high office, has been able single-handed to create such a difficulty I scarcely think some of my colleagues can be sufficiently aware that what Mr Prinsep has done is to jeopardize or destroy interests in land enjoyed by thousands of persons for a period very little, if at all, short of the time which in England would ripen those interests into vested rights, even though acquired originally by naked wrong

For practical conclusions I myself am quite satisfied with the modification of Mr Prinsep's scheme agreed to by His Excellency, who, I am sure, has not unduly disregarded the rights of the classes who were to suffer chiefly at Mr Prinsep's hands I am quite willing that this should be sent to the Punjab as the ultimatum of this Government

If further enquiry is thought necessary, I would suggest that the draft letter, which I presume expresses His Excellency's views, should be turned into a Minute or Memorandum by His Excellency, and communicated to such a Committee as is proposed to be considered with the Lieutenant-Governor's proposals It is not usual to communicate papers of the kind to local officers, but, considering His Excellency's special connection with the Punjab, the objection might be waived

Mr Brandreth should be a member of the Committee, and should bring the conclusions in the form of rules to Simla, where, if Government assent to them, they can have the force of law given to them, as in the case of the Oude rules

(*See No 51*)

No. 58.

PUNJAB CHIEF COURT.

(*7th April, 1867*)

I WOULD reply as follows —The Governor General in Council, without at present expressing any opinion as to the necessity for a third Judge, observes that the appointment of such Judge would require the previous consent of the Secretary of State, and that, as the Court has quite recently been strengthened by the addition of a second Judge, a very strong case would have to be made out for the satisfaction of the Home Government

Proceedings, Financial Department, Expenditure, January, 1869 Nos 129-136

In order that the Government of India may form a confident opinion on the merits of the application, it should have the means of analysing the number of 2,181 appeals said to have been preferred to the Chief Court between February, 1866, and February, 1867 We wish, therefore, to have information on the follow-

ing points —(*1*) how many of these appeals are of the nature of regular appeals, and how many are special appeals under section 17 of the Punjab Chief Court Act, (*2*) how many of the former class were heard by the Court in the exercise of an option, and how many under any rule (and, if under any rule, what rule) considered by the Court to be binding on itself, (*3*) how many of the whole number of appeals were heard by two Judges together, and how many by one, (*4*) during how many days of the period named did the Court sit, and during how many did both Judges sit?

It may be suggested generally, for the consideration of the Punjab Government and Court, whether the whole of the business of the Court is of such a character that there is any real necessity for submitting it to that tribunal, and if there are any of the cases heard with respect to which there is no such necessity, the Government and Court might be invited to propose some expedient for removing such cases from its cognizance, it being always remembered that any change proposed should rather tend to bring the system of the Punjab into harmony with that of the rest of India than to increase the distance between them

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No 59

Upper Burma

(8th April, 1867)

I did not suppose that anything in the Treaties forbade the King of Burma to hold diplomatic intercourse with European Powers At the time when those Treaties were negotiated the fear of French or other European interferences in the East, which caused the prohibition to be inserted in Treaties with the Princes of India proper, had faded away, and the establishment of the French dependency at Saigon could not have been predicted

Proceedings, Foreign Department, Political, May, 1867, Nos 32 34.

But I cannot imagine that the Emperor of the French could consider it unfriendly in us to say we intended to apply the principle of our engagements with the Native Princes of India to the King of Burma, who has been repeatedly at war with us, and who can only communicate with Europe through our territory His own dependency at Saigon supplies a parallel case It cuts off from the sea the territory of the Emperor of Annam, or whatever be the name of the Sovereign from whom Saigon was conquered. It is preposterous to suppose that the French Emperor would allow this Sovereign to send a Mission to England or the United States

Whatever be the real importance of the Mission, that its objects are unfriendly admits of no moral doubt It fits in with the long-repeated suggestions of the Frenchmen in Mandalay who have observed the King's fears, and indeed the stipulation intended to be made that the Emperor of the French shall interest himself in the affairs of Burma is manifestly directed against the English power A lakh of rupees is not raised by a distressed prince like the King of Burma for nothing, yet no commercial intercourse between Burma and France is possible on account of the position of the Burmese dominions

I do not mean to say that I am convinced that any very serious difficulty will at once arise, but the seed may be sown of many disagreeable perplexities. Suppose for example, that the Mission buys some material of war with the money it has in hand, and on the strength of that money obtains more on credit We shall at once be placed in the invidious position of having to apply our rules against the importation of arms, and there may be a demand for compensation from the French purveyor

I think at all events the Mission should be somehow delayed till His Excellency has time to communicate with the Secretary of State for India, and the latter with the Foreign Office in London I much wish at the same time that we could come to an understanding with the Home Government as to the position of the King of Burma, and were able, after telling him what he may and what he may not do, to reassure him as to annexation, fear of which is no doubt at the bottom of his proceedings

I do not enter into the technical question of the right to stop a Mission in transit It is one of the most disputed in international law, and the rules governing it cannot be made applicable to the present case

(*See No 56*)

No 60.

ORIGINAL JURISDICTION OF PRESIDENCY HIGH COURTS

(*30th April, 1867*)

Proceedings, Home Department, Judicial, 2nd May, 1868, No 26

THERE is very little to which I can subscribe in this memorandum of Lord Napier's Indeed, I am not sure that I rightly understand part of His Excellency's reasoning The argument as to the comparative strength of the Calcutta and Madras High Courts is so put as to suggest that it is the number of Judges on the Calcutta Bench which requires explanation or apology But surely the very point of the recent references to and from the Secretary of State is that,

whether the number of Judges at Calcutta be or be not in excess, each one of those Judges, if figures prove anything, does more work than a Madras Judge The simple question is whether, if the Calcutta standard be adopted, one Judge at least cannot be retrenched at Madras, it is unfortunate that the point should be obscured by counter-proposals involving considerations of the greatest difficulty

The severance of the Original from the Appellate Jurisdiction of the High Courts, and the transfer of the former to a separate tribunal, cannot be considered with reference to Madras solely The difficulties attending the measure may vary somewhat in degree at the three Presidency Towns, but their nature must be the same, and one at all events is of equal magnitude everywhere I doubt whether it is possible, and I am sure it is inexpedient, to establish the new tribunal otherwise than by Act of Parliament I do not forget the saving of the legislative powers of the Governor General in Council in section 9 of the High Courts Act of 1861 and in the Letters Patent, but it seems to me questionable whether this reservation implies a permission to destroy one constituent element of the Courts altogether Under any circumstances, it would be much safer to effect the change by an English Statute, since we may be sure that, from its certain unpopularity with the classes principally interested, the legal profession and the European communities of the Presidency Towns, every device of legal strategy would be resorted to for the purpose of defeating and invalidating Indian legislation

Some years ago Sir H Harington proposed to separate the Original from the Appellate Jurisdiction of the High Court, but his plan differed in one most important particular from Lord Napier's He proposed to create a Recorder's Court, under a Barrister Recorder, with a salary somewhat inferior to that of a High Court Judge I could not give my assent to the scheme, and this was one of the few judicial matters on which I differed from our late colleague I find that, on September 18th, 1863, I wrote—

"Another set of considerations to which I must call attention will not necessarily, like those to which I have adverted, lose their force with time I have hitherto assumed that Mr Harington's plan will really relieve the Court from a large proportion of its business, but are we quite sure of the extent to which this result will be effected? I am quite sensible that the existence in the same Court of an Original and an Appellate Jurisdiction is anomalous, and that it spoils the symmetry of our system, especially since the introduction of the Code of Civil Procedure But the moral effects produced, perhaps accidentally, by this co ordination of jurisdictions, are not to be neglected It is a singular circumstance, and one which has an important bearing on the whole question of appeals, that the right of appeal from the original jurisdiction of the High Court of Bengal is virtually in abeyance

Sir M Wells is my chief authority for this statement, which can easily be verified The reason of this is doubtless partly that litigants belonging to an intelligent community are generally satisfied with the decision of a competent Judge, but partly, also, that the appeal practically lies to Judges who are of very much the same ability and dignity, and who are habitually adjusting their judgments to the same common course of decision as the Judge who passes the original order Are we certain, then, that, if we found a subordinate tribunal of Original Jurisdiction, we shall not be devolving on the High Court, under the name of appeals, exactly the same work which it now performs under the name of original trials? It may be possible to find a competent Judge or Judges for the lower Court, although the difference between £5,000 and £3,000 or £4,000 a year will assuredly in the long run correspond to a difference in ability or experience But, however competent be the lower Judge, his Court will always be an inferior Court, and litigants, confident in the merits of their own cause, will always be under a much stronger temptation than at present to take their chance of reversing an unfavourable decision I will add that I have observed (with some regret) that the High Court of Bengal tries, under its Original Jurisdiction, a larger proportion than usually comes before the English tribunals of those cases which it is always worth the while of a defeated litigant to push through any number of stages of appeal, if he has the smallest chance of ultimate success Such are cases in which personal character is at stake—either the social character of an individual, or the mercantile character of a firm

"Even if Mr Harington's scheme were carried out in other respects successfully, I greatly doubt whether one class of cases should not be excepted and reserved for original trial to the High Court I refer to the great commercial cases which are occasionally as heavy at Calcutta and Bombay as at London or Liverpool It is useless and unfair to the litigant to confide the trial of such cases to any Judge inferior to the best at our disposal In London heavy mercantile cases are tried at the Guildhall Sittings, and always by one of the two Chief Justices or the Chief Baron"

Nothing has occurred since to take away the force which these considerations have in my eyes The number of appeals from the Original Jurisdiction is still remarkably small, doubtless owing to the operation of the causes I have noted The slightest suggestion of inferiority in the lower Court would cause the appeals to multiply, and thus the work, which is now done once for all, would be done twice over. There would be more litigation and no saving, but a loss, since the Appellate Court would have to be kept at its full strength

Much weight is also due to Mr Grey's observation that the Appellate Court is itself improved by the Original Jurisdiction

which is appended to it It is an axiom with English lawyers that a Judge confined to appellate work is sure to get sooner or later rusty The corrective is especially needed in this country, where so many false theories are abroad as to the possibility of rectifying the mistakes of Courts of First Instance by Courts of Appeal removed from all contact with the facts

Sir H Harington's plan is not, however, to be measured by Lord Napier's His Excellency does not contemplate establishing a separate tribunal under a Barrister Judge, but would turn the Presidency Towns into Mofussil Districts under a Civil and Sessions Judge The principal reason assigned for a change which His Excellency, on further acquaintance with the country, will discover to be one of great political seriousness, is that a new prize will thus be created for the Civil Service The principle seems to be altogether vicious, but, apart from that, I am convinced that the Civil Service could have no greater injury done to it Lord Napier can scarcely be aware that, until the remote time when India has a complete Civil Code, the Presidency Towns must continue to be in great measure under a regimen of English Law, as declared in England by the highest and latest authorities Added to this, the cases decided on the Original Side of the High Courts are, so far as Calcutta and Bombay are concerned, disposed of with a rapidity and under a stress which have their counterpart only in the business of a hard worked Vice-Chancellor's Court at Lincoln's Inn In spite of the marked judicial capacity which we sometimes observe in the Civil Service and which is becoming commoner every day it will always be very rarely that we shall find a gentleman qualified by reading (and the qualification will mainly have to be acquired by reading) to administer justice under such conditions Indeed, I understand Lord Napier to admit that a qualified branch of the Service will only be reared very slowly But meantime the mischief of various kinds which may have been done can hardly be over-estimated

I am not sure of the exact position of the memorandum which has been sent to me for disposal If it can be noticed here, I should be glad to turn this note into a Minute, and so prevent the long and unprofitable correspondence with the Secretary of State which may result from the Madras Government adopting Lord Napier's proposal and formally referring it to the India Office

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No 61

CONSTITUTION OF POLICE SERVICE

(8th July, 1867)

Proceedings, Home Department, Police, August, 1867, Nos 3 4

As far as I am able to form an opinion on the question, I adopt Sir G Yule's conclusion that the rough maximum of a

half should be taken for the number of military men in the police of a given province I do not believe in any large service being efficient or respectable if uncovenanted agency too greatly preponderates in it The sources of such agency are too miscellaneous or uncertain, and the safeguards against jobbery too feeble.

No. 62

Act XX of 1863, Religious Endowments

(11th July, 1867)

Proceedings, Foreign Department, Revenue, July, 1867, Nos 15-16

THE law applicable to the case of religious foundations of which the managers are *not* appointed by Government seems perfectly clear—*vide* the distinct language of section 4 of Act XX of 1863. Sections 5 and 6 also refer to such foundations, and the duties of the managers are defined in the first part of section 13 and the penalties for misfeasance described in sections 14 and 15

The committees appointed to take the place of the Board of Revenue in cases where the Government used to appoint the manager appear to me less intended to protect the temple property than to be interposed as a body which should nominate the managers

The Act (Sir C Beadon's Act XX of 1863) is, I believe, unpopular with natives, but it was fairly forced on this Government by public opinion in England

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(See Nos 10, 73, 80 and 87.)

No. 63

Indian Contract Bill.

(15th July, 1867)

Proceedings, Legislative Department, May, 1872, Nos 513-615.

THIS is the second chapter of the proposed Civil Code Under the rule of the Legislative Council which permits Bills to be published before their submission to the Legislature But this rule is so framed as not to apply when the Council is holding weekly sittings, however formal they may be, and, accordingly, early publication being a matter of urgent moment, I am reduced to proposing that the Bill be introduced and referred to a Select Committee merely as a form, it being explained at the time that the object is only to get the Bill before the

public, and that no Committee will actually sit until we reach Calcutta

I have assigned in the Statement of Objects and Reasons the grounds on which I have omitted certain sections of the Commissioners' draft I venture to predict, with some confidence, that the Council will allow this to be done Having committed myself, in conjunction with Sir H Harington, and with the concurrence, and indeed at the instance, of the last Governor General, to a very different view of the Law of Specific Performance, I could not with honour propose such an enactment on the subject as appears to commend itself to the Commissioners The submission of such an enactment, if at any time it receives the express approval of the Home Government or of the Government of India, may well be reserved for my successor, and the proper time for submitting it will be the period at which the revision of the Code of Civil Procedure is again taken up, the Secretary of State having postponed it for the present

It is perhaps necessary to add that nobody but the writer is responsible for the Statement of Objects and Reasons It is in the nature of a speech, and, in fact, is generally framed from the remarks made by the mover on obtaining leave to introduce a Bill

It cannot, I think, be honestly denied that the omitted sections (which are printed in the appendix) are, in truth, directed against indigo-planting I would call attention to the "Explanation" appended to section 52, and to "Illustration" (*c*), also to the "Explanation" added to section 59

These Exceptions, Explanations and Illustrations (which, in fact, constitute rules) can only in my judgment be defended on the ground that there is some special practical object which may be attained through the exceptional provisions

Now, there is no such special practical object to be attained Whatever be the evils of indigo-planting, they no longer arise from a complicated system of contracts The planting which did depend on such contracts is virtually extinct, and its place has been taken in Tirhoot and elsewhere by a system which depends for its stringency on zamindari influence, direct or indirect This is a result, and far from a satisfactory result, which I from the first predicted when I saw that the course likely to be followed would consist in preventing the indigo-planters from enforcing their contracts, without, at the same time, taking any steps to sift the equitable from the inequitable contracts, and to give facilities for enforcing the former

Again, it is not a case of limiting or amending a procedure which is found to work oppressively The rules of the Code of Civil Procedure on the subject of Specific Performance of Contract, that is (the *actual* performance of contract, as opposed to the payment of damages), and of injunctions against intended

breach of contract, cannot easily be worked by anybody, and by an indigo-planter not at all The planter, when he sees the ryot preparing for another crop the ground which he has contracted to sow with indigo, must file a regular suit in the Civil Court before he can obtain a decree for Specific Performance, or an injunction Both are appealable, and, before the ultimate decision can be given, the crop has long since been reaped and sold, or consumed

The effect, therefore, of attempting to make these sections law would be to put a perfectly needless and useless affront on the European community It is true that the section of even the indigo-planters which is directly interested in the question is but a small one, still the old quarrels have left traces behind them, and the whole unofficial community would consider itself attacked, and the contest would be entered into without any sort of object

It may be observed that, though the sections are directed against indigo-planters and are intended to be favourable to the cultivating class, they would operate very disadvantageously for artizans and labourers for hire The "explanation" added to section 59 (of the appendix) speaks for itself but under "illustrations" (*a*) and (*b*) added to the same section any emigrant coolie or labourer, for a term, might be restrained by a perpetual injunction from serving anybody except his first employer, and thus might have to choose between cruelty and starvation

I have thought it right to publish the sections in question, that the proposed law may have whatever advantage is given to it by the Commissioners' authority But I am compelled to dissent from their proposal, and I do not disguise my own opinion that, when the rest of the new law (which has my highest admiration) has been some time in operation, and when the improvement which has begun in our judicial service has proceeded some way, the Civil Courts of India ought to be empowered to decree more speedily, and easily, the actual performance of Contracts (whether through the agency of Specific Performance properly so called, or through that of Injunctions), instead of leaving the plaintiff to the barbarous and (in this country) illusory remedy of pecuniary damages In this way, and in this way only, will the Government of India be relieved from the perpetually recurring cry for a penal Contract Law

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(23rd July, 1867)

These papers have again come to me, possibly through accident, but I think that a few more words from me may save from some misapprehension those Members of Council who have not yet seen them

His Excellency the Viceroy appears to me to be under the impression that there is some law of Specific Performance in India which may be used to enforce an indigo contract There is no such law The provision in the Code of Civil Procedure that the forms of a regular suit must be gone through before a decree for Specific Performance or an Injunction can be obtained is an absolute bar to its being employed in indigo matters

If the Commissioners' sections become law, they will in no respect alter the existing procedure They will only throw it into a form singularly obnoxious to the European community, through the special exception of indigo contracts from the operation of principles elsewhere recognized.

My contention is that the sections are in their wrong place A Civil Code of Contract embodies the answer to the question—What is a contract? A Code of Procedure in contract contains the reply to the question—In what mode shall a contract be enforced? My opinion is clear as to the Code in which the rules of Specific Performance ought to be set forth

I have accordingly proposed to postpone the question of Specific Performance until the proper moment for discussing it arrives—the period, namely, when the Secretary of State gives leave to the Legislature to undertake the revision of the Code of Civil *Procedure* I do not wish to discuss either the sections of the Commissioners or those prepared by Sir H Harington and myself, first, because it is the wrong time for such a discussion, and next, because, if either one or the other set of rules were carried now, they would assuredly have to be repealed when the Code of Procedure was revised

I submit, at the same time, that I have paid all due deference to the authority of the Commissioners I have printed their sections in an Appendix and they will have as much publicity, and will be as widely circulated as the Bill itself If any Member of the Select Committee or Council thinks fit to move them by way of amendment, they are ready to his hand This course seems to me infinitely preferable to placing me in the not very creditable position of having to oppose my own Bill

I frankly admit that I hope the good sense of each and every Member of the Legislature will lead him to refrain from moving such an amendment In the discussion which will come, things will almost infallibly be said which will be offensive to the European community on one side and to the Law Commissioners on the other Attention will be diverted from the important parts of the Bill to its least important provisions A prejudice will be created against what is really a most beneficial measure And, when all is done, it will come practically to the same thing whether the sections are carried or whether they are not carried.

I am sorry that some remarks of mine have given occasion to His Excellency to enter on the question of substance Whe-

ther indigo-contracts are or are not extinct—whether they are always fair or always unfair—may be matters on which there is room for legitimate doubt, but which there is not the smallest practical use in discussing now

Let me add that His Excellency is mistaken in supposing that the Secretary of State has especially approved of these sections. He has merely requested that a "measure founded on the Commissioners' draft" may be submitted to the Legislature As Lord Cranborne, in replying to a question about my own sections (intended, be it remembered, for a Code of *Procedure*), stated in Parliament that the planters had grievances which ought to be remedied, he can scarcely approve of sections which would practically have the effect of excluding the planters from civil remedies

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(*25th July, 1867*)

After reconsidering the subject discussed in Council yesterday, I have to say that I am willing to change the form of the Bill which embodies the "Indian Contract Law" I do this, partly out of deference to the strong feeling which appears to be entertained by His Excellency the Viceroy, partly because I do not wish to deprive the country any longer of the great boon which will be conferred on it by the mere publication of those parts of the Bill which define and describe contract, and partly because, while I feel strongly the falsity of the position involved in moving the reference to a Select Committee of a Bill of which I in some measure disapprove, yet I think that almost any anomaly, *confined to India*, is better than that this Government should formally refer to the Secretary of State the question whether the Legal Member of Council is bound to move the adoption of certain provisions from which not only does he dissent, but h... dissent from which is so notorious that questions respecting his views have been asked in Parliament

I am willing, therefore, to transfer the Specific Performance sections from their present position in the Appendix to the end of the Bill, in which they will be included, and I propose, after the discussion of these sections in the Statement of Objects and Reasons, to add some such passage as the following —

"These sections are retained in the Bill out of deference to Her Majesty's Commissioners, but it is the intention of the Member of Council charged with the Bill to move their omission in the Select Committee, or, if necessary, in the Council, principally for the following reasons"

Then will follow the last two paragraphs of the statement in their present form

But, while I state my willingness to take this course, I must again take the liberty of expressing my doubts whether it is expedient, and not only whether it is expedient, but whether it is

not especially inexpedient from the point of view of the Viceroy and of those who agree with him

1 It renders an irritating discussion inevitable If the omitted sections are replaced in the Bill, it is due, not simply to myself and my opinions, but to the character of Sir H Harington, that I should attempt to get them out. On the other hand, if they are left in the appendix, the chances seem to me to be that the good sense of all will prevent their being moved by way of amendment The consequence will be that, though there may be a little discussion by the Press when the Bill is first published, the whole subject of Specific Performance will be postponed, as His Excellency would apparently wish, till long after the Viceroy and I have left the country, and will probably be rediscussed amid a totally new set of ideas on the subject of contract produced by the present Bill, and possibly in a totally different set of relations between planter and ryot. Meantime, so long as the Code of Civil Procedure is unrevised, the law does not admit of the specific performance of a contract to cultivate a particular crop, or in a particular manner

2 The result, which I understood the Viceroy to deprecate strongly in Council, namely, that His Excellency himself, or somebody who agrees with him, should have to move these sections by way of amendment, is very likely to occur, even though they are placed at first in the body of the Bill It follows, of course, from what I have said, that I consent to move the reference of the Bill to a Select Committee, although, strictly speaking, such a motion, according to our procedure, implies approval of all important parts of the measure But in Committee I must move the omission of the sections, and I may possibly succeed In that case the Bill submitted to Council at what may be called the third reading will not be the Bill in its original form, but the Bill *as amended by the Select Committee* Consequently, anybody who, contrary to the recommendation of the Select Committee, wishes to replace the omitted sections will have to move them by way of amendment

3 I submit that, in insisting on the inclusion of these sections, the Viceroy, or anybody who agrees with him, abandons a strong position for a weak one The report of the Indigo Commission is now seven years old, and, whether or not His Excellency is right in denying that the old indigo contracts are extinct, there can be no reasonable doubt that they have been widely and considerably modified Still I freely admit that when anybody attempts to amend the present Code of Civil Procedure, which does not admit of the specific performance of any kind of cultivating contract, the conclusions of the Indigo Report present a formidable, and perhaps insuperable, obstacle to his success, if the effect of the amendment will be to give an advantage, however slight and incidental, to the planter But, on the other hand, I submit that there is *not* sufficient evidence to go

upon if the offensive is taken, and if one places oneself under the obligation of showing that indigo-contracts should be excepted *eo nomine* (as is virtually done by the Commissioners) from a class of enforcible contracts to which they would otherwise belong, and to which they would belong even under the narrow English law Direct, distinct, affirmative evidence, bearing on the state of things now existing, is required in such a case, not inferences from the Indigo Report or suspicions derived from the relative characters of European and Native I only state the results of my own experience when I say that so long as the planter is denied the help of the Civil Law in enforcing his contracts through a general provision of the Procedure Code evidently not framed with any special reference to his position, it is all but impossible to make any change which assists him, however incidentally, in the face of the doubts suggested by the Indigo Report. But it becomes a very different matter when the positions are reversed, and when the opponent of the planter proposes a new law of Specific Performance and denies the benefit of it to his contracts with the ryot, not on the score of proved want of equity in particular contracts, but on the *à priori* assumption that all such contracts are from the nature of the case unjust.

As I have said, however, rather than make a reference to the Home Government, I will adopt the course which I do not think the best.

(27th July, 1867.)

I am extremely sorry to have to ask the Viceroy and my honourable colleagues to read anything more from me on the subject of the "Indian Contract Law," but I perceive from a second note by His Excellency, which has been in circulation, that the discussion next Wednesday will be incomplete unless I touch on a side of the question before us which I have hitherto scrupulously avoided—its merits I have hitherto confined myself to reasons for omitting the Commissioners' sections which are not reasons of substance These are—

(1) that the sections will embark us in an irritating controversy,
(2) that they will do so needlessly, since they will effect no practical change in the existing law,
(3) that they will do so prematurely, since the revision of the Code of Civil Procedure will furnish a much better occasion for discussing the subject of Specific Performance,
(4) that they are out of place

On my former notes, however, the Viceroy has made the remark that apparently I do not object to the Commissioners' rules of Specific Performance and Injunction, but only to the exception

of indigo-contracts It is thus evident to me that, by trusting to the objections just enumerated, I have placed myself at a disadvantage The truth is, I object to the rules as much as, or even more than, I do to the exceptions

The grounds on which I quarrel with the rules are much wider than those on which I quarrel with the exceptions My opinion is that the greatest evil connected with the Civil Procedure of India is one quite apart from indigo-contracts It is the system of *unexecuted* decrees for money or pecuniary damages Until my own proposals fell into abeyance, I was collecting evidence on the point, and had collected a great deal It was all one way It showed that such decrees are rarely, indeed almost never, executed in India against small debtors in the way required by the theory of the law This is, perhaps, inevitable in a country in which the debtor has so little "visible" moveable property, and in which his land depends so much for its value upon his labour, and, indeed, if it consist in a right of occupancy, cannot be taken in execution The result is that these decrees are *learned* They are divided, bequeathed, inherited and sold in open market Probably there is nothing which more astonishes an English Judge fresh from home Finally, these decrees get into the hands of some neighbour of the debtor, richer than himself probably the village money lender By him they are so used as to become an instrument of monstrous oppression They are enforced by a little at a time, or bonds, bearing enormous interest, are taken for forbearance, or they are retained as means of exercising power Meanwhile there is no Insolvent Law in the Mofussil by which the debtor can release himself

The rules of Specific Performance and Injunction framed by me with Sir H Harington's assistance would have tended to cure this great evil, which probably affects thousands where the indigo-contracts affect scores Under these rules the Civil Courts would have ordered the defendant to perform his engagements or restrained him from breaking them instead of waiting till he had committed a breach of contract and then handing him over to the plaintiff It appears to me that in this way only can Indian Courts discharge the duty imposed on them by the theory of the law At present they seem to me to act pretty much after the fashion of certain tribunals which have no very savoury historical reputation They condemn the defendant and then turn him over to somebody else to be tortured

The sections in question proceed on the assumption (which is made by every civilized body of law in the world, except the English) that a wide and liberal law of Specific Performance is to be preferred to a narrow law But they are fenced round with restrictions which would effectually prevent their being applied in any case in which the extraordinary civil remedies of Specific Performance and Injunction would cause injustice or

hardship, as compared with the ordinary civil remedy of damages

The draft revised Code of Civil Procedure is put up The Specific Performance sections are 24, 25, 133, 134, sections 314 to 317 (both exclusive), and section 328 The rules concerning injunctions correspond

I would further call attention to section 62 of the Code of Criminal Procedure (also put up) It is, I believe, the provision of the Code on which Magistrates most rely for good administration and the prevention of crime and disorder, and it embodies a true *Criminal* Law of Specific Performance and Injunction, now in force in India

I also take the liberty of appealing to certain remarks of mine made in the Legislative Council when I transferred the charge of my sections to Sir H Harington They are contained in the volume of Legislative Proceedings put up My argument is much weaker than it would be if the present Bill became law, for almost any Court will now be able to apply the proper tests of validity and invalidity to contracts

I fully admit that my sections would have applied to indigo-contracts, unless such contracts were excluded by the limitations embodied in the law I also admit that, but for the planters' agitation, it is very likely that the grave defects in Indian Civil Procedure to which I have adverted might have escaped notice But this is only an illustration of a phenomenon many times seen The European community has rarely been disinterested in its agitations, but its grievances have constantly opened its eyes, and ultimately those of the Government, to many real and grave defects in our laws and administration

I assert, however, that if an indigo-contract satisfied the conditions of those sections, and if, further, it satisfied the tests of valid contract set forth in the new Bill, and known for centuries to lawyers, on every principle of justice, it ought to be enforced by the Civil Courts

My own opinion is that, if my sections had become law, they would have revolutionized the relations of planter and ryot. The practice of hoarding money-decrees, and holding them over the ryot *in terrorem*, was one of the greatest evils of the indigo system That would have come to an end My sections further denied the benefit of their procedure to contracts for more than five years—a provision which would have put an end to those long contracts under which the ryot was almost enslaved, and I would have consented to shorten the duration of the contracts, if necessary Further, a contract, in order to come under the new law, had to be registered under the Registration Act, so that the personation imputed, justly or unjustly, to the planters would have been rendered impossible, and the actual assent of the ryot would have been established

Under such a system it is all but certain that the whole of

the existing indigo-contracts would have been abandoned, and all contracts would have assumed a new form And, after all the securities required by my sections had been provided in the initiation of the contract, the planter, if the present Bill became law, would be compelled to satisfy the Court of the inherent equity of his contract before he obtained his remedy—a remedy which, I may observe, would, in the great majority of cases, have been, not a decree for Specific Performance in the strict sense of the words, but an injunction against meditated breach of contract, since a complicated contract to cultivate in a particular way is not "certain" within the meaning of my sections

This attempt, not, I venture to think, quite unworthy of the importance and difficulty of the subject, has now miscarried The Secretary of State has vetoed it, and the Law Commissioners now propose that the planters shall be outlawed so far as the civil law is concerned The expedients by which a native enforces a money-decree against a small debtor are, of course, impracticable to a European The Viceroy anticipates that, in the absence of legal power of constraint, the planters will make fair contracts If I know anything of human nature, I predict the exactly opposite result I think they will become careless of the equity of their contracts, and will trust to zamindari influence, and to other less legal, though not less oppressive, methods to enforce them

The Viceroy has observed in the same note that my objection to the misplacement of the sections in a Civil Code is only "technical" If the observation is made in disparagement, I do not accept it Scientific faults are of great importance in our Codes, which are destined, I am sure, to exercise great influence on English jurisprudence—an influence which the proposed arrangement would be likely to impair

I do not wish by this note to provoke a paper controversy, but merely to ensure the completeness of our next discussion, and to guard myself against being supposed to make a concession which I never intended to make Nor do I desire to recall the offer which I made to include the omitted sections in the Bill, provided I may expressly reserve to myself power to oppose them afterwards

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(14th August, 1867)

His Excellency the Governor General, while expressing himself sensible of my offer to defer to his views by including the omitted sections in the Bill, subject to a right reserved on my part to move their omission at a later stage, has intimated in Council that he does not consider such a course would be expedient It has therefore been decided that the discussion on the sections shall be communicated to the Secretary of State.

The misfortune of differing from the Indian Law Commissioners on a point of law and from the Governor General on a point of policy does not often happen to me But, as my opinion is strong, and as my position, owing to passages in the past history of the question, is somewhat peculiar, I have thought it right to maintain my position

The question as to the proper place of the sections is, I may observe, raised in a singularly distinct form The case is not like that of those rules of procedure which were sent to us by the Commissioners with their Chapter on Succession At that time there was not in India any procedure to regulate probate and administration, and consequently, if the new rules of succession were to be worked at all, it was necessary to supply a new procedure But now we *have* a Law of Specific Performance in India and of Injunction against breach of contract, and this law is contained in the existing Code of Civil Procedure. The point is therefore distinctly raised whether this law shall or shall not be removed from the Code of Civil Procedure, and transferred to the Code of Substantive Civil Law

I do not for a moment deny that something is to be said for including Specific Performance and cognate topics in the province of procedure I have admitted in the Statement of Objects and Reasons appended to my Bill (which I beg may be considered as incorporated with these notes) that there is between law and procedure a debateable land Nor do I doubt that many more reasons for the course taken in the Commissioners' draft have suggested themselves to the Commissioners than have occurred to me At the same time, I hesitate to place among the reasons which have determined the Commissioners those which appear to be urged in the last note of Sir H Durand, which, by some accident, I have only just seen If I rightly understand my honourable and gallant colleague, his argument is that the Commissioners were justified in including Specific Performance and Injunction in their draft because those subjects have great importance in connection with contract The fact is undeniable, and unquestionably this very impression, that whatever is incidentally important in connection with a particular branch of law may legitimately be dealt with as part of it, is one which is shared by large numbers of English writers on Law These writers almost systematically confound the boundaries between law and procedure, and hence it is that the most comprehensive treatise on the English Common Law is nominally a work on "Nisi Prius," that books on the "principles of equity" run off into discussions on the practice of the Court of Chancery, and that exhaustive discussions of those principles are found in treatises on "Equity Pleading," and on "Decrees" But nobody who has bestowed much thought on the matter can doubt that the impression I have referred to is, in fact, the great cause of the confused arrangement of all English law-books,

by the Secretary of State Theoretically, I admit that such a direction might be given, but it would be a strong measure to dictate the detail of a Bill and an extreme measure to impose it, in effect, on a Member of Council committed to a different mode of legislation I have seen during my term of office many requests from the Secretary of State for legislation in a particular sense, but these have always been couched in the most general language I remember that the direction to submit to the Legislature a most important measure—the abolition of the Grand Jury—was conveyed in a few lines

I will only add my hope that nothing I have written may be interpreted as implying that I do not think the indigo system should be carefully watched Indeed, one of my principal reasons for objecting to the Commissioners' proposal is that its tendency is to leave that system entirely to itself.

(9th April, 1868)

After very carefully considering the Fourth Report of the Indian Law Commissioners, and particularly the first portion of it, I cannot help feeling much uneasiness on two points

I am afraid, in the first place, that the Report may produce an impression that, in omitting certain draft sections relating to Specific Performance and Injunction from a Bill which it became my duty to conduct through the Legislature, I have been guilty of some discourtesy towards the Commissioners, or some disregard of their undoubted claims to respect The Viceroy indeed and my honourable colleagues will not suspect me of any such lapse from duty and good taste, for they, or most of them, are aware how earnestly I have striven to prevail on the Legislature to sanction the Commissioners' drafts with the minimum of change, and they will believe me when I say that, in making this effort, I have often had to contend against criticisms which were at least plausible, and to struggle with difficulties which, however slightly they may be believed in at home, are still real and substantial, and not the less real and substantial because they assume a form somewhat unlike that of the obstacles which impede legislation in England There may, however, be readers of the Report who have no particular reason to give me credit for the strongest desire to give effect to the recommendations of the Commissioners I wish, therefore, again to state that the omitted sections are at variance, both in respect of substance and in respect of place, with certain provisions of the existing Indian Code of Civil Procedure The fact that all I have done has been to maintain against the recent proposal of the Commissioners the law and the arrangement of a Code which has been seven years in force in India, and which even the High Courts are bound by their Letters Patent to follow, seems to me conclusive on the question of courtesy and defer-

ence I appeal to that fact on this question alone, for I do not deny that there may be good reason for changing the law, or for altering its place, or for both.

There is an impression of another kind which may have been created in the minds of my colleagues, but which I am most anxious to prevent or dispel The language of the Commissioners may have been affected by the form of their observations, contained as they are in a Report addressed directly to Her Majesty, but, whatever be the cause, this language is so unqualified and peremptory as to lead perhaps to a suspicion that, taking advantage of my official position, and possibly of some credit which may attach to me of having given special attention to a particular class of studies, I have, in denying that the proper place for the omitted sections was a Code of Substantive Law, put off on the Government and the Legislature a trivial or careless opinion I must therefore attempt to show my colleagues how far my assertion was one to be disposed of in three brief paragraphs I regret that the discussion must necessarily be of a kind which can scarcely be attractive to persons unfamiliar with the enquiries on which it turns

The argument of the Commissioners is as follows —

"To enforce the specific performance of some contracts is impossible, of others it is inexpedient. It is the province of a Code of Substantive Law to define the rights and liabilities of parties arising out of their contracts and in so doing to specify what contracts may and what shall not be specifically enforced This is no part of Procedure The proper province of Procedure is to point out the mode in which effect is to be given to rights already defined, and not itself to define those rights"

The distinction here indicated between rights and the modes of enforcing them originated with Bentham, and is the foundation of his distribution of Law into Substantive and Adjective It is the commonly received distinction, and it undoubtedly determined the arrangement of the New York Code If I could bring myself to accept it as rigorously correct, it is possible that I could bring myself to acquiesce in the conclusion of the Commissioners. But, on the authority of Mr John Austin, I decline (and, if my own opinion were of the least consequence, I might add that I have always declined) to admit the possibility of establishing a complete distinction between rights and the modes of enforcing them, and on the same authority I deny that any such distinction can be made a basis for strict legal classification

Mr Austin is the only writer on Jurisprudence whose opinion outweighs Bentham's in the few instances in which they differ Since he has been quoted by the Commissioners as an authority against me, it is proper that I should indicate, by precise references to his published writings, what his opinions

really were While Austin (Vol II, p 291) was not prepared to abandon expressions so convenient as Substantive and Adjective Law, he denied the validity of the distinction on which this distribution of Law rests (Vol. II, pp 451, 452 *et seq*), assigning, among many conclusive reasons for his denial, the undoubted fact that there is a large class of rights which cannot be completely distinguished from the procedure by which they are enforced The proper distribution of Law, apart from the Law of Status which occupied a peculiar place in his system, Austin (Vol II, p. 454) declared to be into (A) law "regarding rights and duties which do not arise from injuries or wrongs, or do not arise from injuries or wrongs directly or immediately," and (B) law "regarding rights and duties which arise directly and exclusively from injuries or wrongs." A Code or a part of a Code corresponding to A would not widely differ from a Code of Substantive Law as understood by Bentham A Code or part of a Code corresponding to B would include procedure (Austin, Vol II, p 454), and, so far as it related to Civil Law, would not largely differ from a Code of Adjective Law or Civil Procedure. But between either Code as understood by Bentham, and either Code as understood by Austin, there would be differences, and it is exactly on these differences that the whole question turns in the present case

So far, nothing probably seems more remote from popular ideas than Austin's language and reasoning Yet the truth is that Austin's distinction between the two great departments of Law answers much more nearly to popular conceptions than does Bentham's Austin explains that the foundation of his classification is the *fact* that obedience to the law is imperfect (Vol II, p 453) Code A on Austin's system declares rights on the assumption that everybody gets his rights. Code B declares and defines rights and duties which suppose that obedience to the law is not perfect, and which arise entirely from that imperfection of obedience This is a real distinction and easily understood, while it may be doubted whether Bentham's is more than verbal, and when carried into detail it certainly occasions not a few perplexities

Now, in which Code, A or B, would Austin have placed the Specific Performance of Contracts? His language appears to me not to leave room for a doubt on the point. He describes (Vol I, p 101) the right to compel Specific Performance as a "right arising from a civil delict which is an infringement of a right *in personam*" He would therefore have placed it in Code B, in which he would also have placed mere Procedure And here I take the liberty of recalling to mind the language I employed in my Statement of Objects and Reasons "If we suppose that a Code of Substantive Civil Law and a Code of Civil Procedure were being framed simultaneously, and that the framer of the Codes had the power of placing the Law of Speci-

fic Performance in either Code, there cannot be much doubt that he would consider it *as cognate to* Procedure rather than to Substantive Law"

Is there anything in the treatment of Specific Performance by the Commissioners which implies that they take a different view of its nature? I venture to think that there is not On grounds of morality alone they cannot for a moment be supposed to have intended to lay down that the law releases a man from the exact performance of his contracts in all except the very few cases in which they allow him to obtain a decree for Specific Performance or an Injunction against a breach of his engagement They have obviously treated the right to Specific Performance as a right arising out of the actual or threatened violation of the rights created by contract—as a "right of action," which, as Austin says (Vol II, p 455) "cannot be completely distinguished from the action or procedure which enforces it" Of all such rights it may be doubted whether there is any one so dependent on the mechanism of Courts as the right to Specific Performance I do not think it could be very incorrectly described as being, not a primary right, but a mere limitation of a primary right, arising out of the necessary or artificial imperfections of Procedure

The impression that Austin would have classed Specific Performance with Substantive Law has arisen, I venture to think, from its not having been perceived that his acceptance of this very expression "Substantive Law" was only provisional and under protest. The passage which occurs at Vol I, p 101, might perhaps appear to bear out this impression, if Austin had written nothing more But it is only part of a syllabus of lectures The lectures themselves have been more recently printed in Vol II, and they seem to me to show that Austin's views admitted of no construction except that which I have put upon them

I ought perhaps to anticipate the argument that there are signs in their draft chapter on Contract that the Indian Law Commissioners, like the New York Commissioners, had accepted Bentham's distinction between Substantive and Adjective Law in Bentham's sense, and that I was accordingly bound to maintain it But surely I may contend that, in subsequently quoting Austin against me, the Commissioners have justified my refusal to take Bentham's distinction except as modified by his successor It must be remembered, too, that I was not simply required to place the Law of Specific Performance in a Code to which I ventured to think it did not properly belong, I was further required to take that law out of a Code which is in actual operation and in which I considered it rightly placed It would be very uncandid not to add that I was glad of an opportunity of escaping from the grave political difficulty in which the proposal to enact the omitted sections was sure to involve us

I can scarcely doubt that I have already wearied most of those whose duty it will become to read this paper, and on that ground alone I hesitate to point out why it is that the illustration taken by the Commissioners from Criminal Law does not, in my humble judgment, bear out the desired conclusion But I have a further reason for not travelling into this subject It is not fully treated of in Mr Austin's Remains, and my object in recording this Minute is, not to argue against the Commissioners, but to rebut the inference which the brevity of their language may suggest, by appealing to an authority to whom all who have bestowed the least thought on this class of enquiries will bow, and to whom they have themselves appealed

I have not the same strong personal reasons for commenting on the last part of the Commissioners' Report which have led me to observe at such length on the fifth, sixth, and seventh paragraphs I do not of course admit that there is justice in the observation, that all that "is alleged against the omitted sections as a fault is, in effect, that under them Specific Performance of contracts for cultivation cannot be enforced by the imprisonment of the contracting cultivator," but I should be the last person to deny that it is a fairly disputable point whether the Indian Courts should be invested with extensive powers of decreeing Specific Performance The grounds of my own opinion have been repeatedly submitted to the Secretary of State for India

If I demur to the assertion that the limitations of the power to compel Specific Performance characteristic of one branch of English law involve "principles of universal application," it is not for the purpose of controversial argument Mr Austin indeed had apparently a less exalted idea of the value of those limitations than the Commissioners, since, after promising to "analyse the principles wherein Specific Performance is rationally compelled,"—a promise no doubt fulfilled, though no traces remain of the mode of fulfilment,—he adds, "the caprices of the English law with regard to Specific Performance and with regard to the connected matter of recovery *in specie*, I shall try to explain historically" (Vol I, p 102) But it is on the ground of the practically dangerous consequences in India of the Commissioners' doctrine that, with all deference, I must enter my protest against it

The principles of English law must, I submit, be taken to be the principles of English law as a whole, not of any one branch of it Now, it will not be disputed that, in England, the specific performance of small contracts is compelled, not by the Civil, but by the Criminal Law, nor has there apparently been any hesitation in enforcing such contracts by criminal remedies on the ground that the matters contracted for amounted to a "succession of acts, or the exercise of skill, or the application of personal labour" Nobody can doubt that the Master and

Servants Act of 1867 (Statute 30 & 31 Vict , c. 141) was passed with the most kindly intentions towards the classes affected by it Yet what does it amount to but a far-reaching Law of Specific Performance, ultimately enforced by three months' imprisonment in the House of Correction? India, however, is a country of small contracts, so that, if the principles of English law be of universal application, the case for a general Penal Contract Law would seem to be complete Nor is this a fanciful conclusion The argument of the advocates of a Penal Contract Law has, as a matter of fact, been, that the Penal Contract Law did to a very great extent exist in England, and that as the "caprices" of English law, in distinguishing between one small contract and another, could not be transferred to India, the English law, transplanted to this country, would give a general Penal Contract Law The English Parliament, they said, has never hesitated to compel the specific performance of small contracts by criminal penalties, whenever the public interest or the interest of some powerful class required it—why should the Indian Legislature be more squeamish?

But India, if it is a country of small contracts, is also a country over which Civil Courts are comparatively much more widely and generally diffused than in England, and in which the habit of resort to the Civil Courts penetrates far more deeply among the population than it does in England It is also a country in which there is reason to believe that the directions of a Court, if express and specific, are, as a rule, obeyed without demur Those who have thought that, by taking advantage of these peculiarities to give further extension to a principle which the English Civil Courts have themselves been obviously labouring of late years to extend, they could prevent the perpetual recurrence of a demand for the coarse remedies of the Criminal Law, may perhaps deserve charitable construction, even should the experiment never be tried or fail If the enlargement of the Law of Specific Performance proposed by Sir Henry Harington and myself, but condemned by the Indian Law Commissioners, had been carried into effect, it was intended to take steps for the repeal of nearly all the petty Criminal Contract Laws which we have in India, including section 492 of the Penal Code and Act XIII of 1859 (the Artificers Act), now extended to a great part of the country under the power contained in its fifth section The object of the rejected scheme was, in fact, virtually to transfer to the Civil Courts the cognizance of the entire subject of Contract

I should perhaps be doing myself some injustice if I did not state that, out of the numberless questions raised by the Commissioners' drafts, this is the only one of the smallest importance in which, to the best of my recollection, I have not either entirely concurred with the Indian Law Commissioners, or waived my own opinion in deference to theirs That there is some appa-

feel that, after our call for opinions has been thus responded to, it would be useless for me to raise my single voice in Committee or in Council in favour of the rule which I prefer On the other hand, the rule thus objected to is nearly the most fundamental in the whole Code, and it indirectly affects many other provisions Whatever be the modifications to which the Commissioners may think fit to make it subject in consequence of the strong opinions which we have received, I entertain great doubt whether the proposal of the Select Committee to reverse it directly in terms will commend itself to them

I therefore suggest that we move the Home Government to place before the Indian Law Commissioners the difficulty in which the Indian Legislature is placed by the tenour of the replies sent to it by the Local Governments

I trust that the Viceroy and my honourable colleagues, if they agree to make this reference, will not object to call at the same time the attention of the Secretary of State to the grave inconveniences, known more or less to all of them, which result from the want of easy and expeditious communication between the Indian Law Commissioners and the Indian Legislature

I need scarcely state that the real discussion on the drafts of the Commissioners does not take place in the open Legislative Council There may be some debate there occasionally, but it cannot be regarded as more than formal, since it may be assumed that the Council would always, as a matter of course, refer a draft of the Commissioners to a Select Committee, thereby affirming generally the necessity of legislation in the sense of their proposals The true discussion is confined to the Select Committee The Committee on one of these Bills would ordinarily consist of all the Additional Members of Council who belong to the Civil Service, of such mercantile and native Members as may be supposed to have experience in the subject-matter of the Bill, of the Law Member of Council, and of such Members of the Executive Council as can be spared from heavy departmental work

Now, suppose that the Committee so formed feels a difficulty—which, for the moment, I will assume to be a reasonable and legitimate difficulty—as to any specific proposal of the Indian Law Commissioners The course of proceeding is this The Select Committee reports to the Legislative Council. The Law Member of Council then brings the report before the Executive Council The Governor General in Council then writes to the Secretary of State, who writes to the Law Commissioners The Commissioners then make a report direct to Her Majesty, and their decision follows the same course in reverse order before it reaches the Committee

I think that the mere description of the system shows that some change in it is required, or, if that be denied, some explanation of the principles on which it is maintained What the pre-

cise change should be it would perhaps be more respectful in us to leave to be settled between the Secretary of State and the Indian Law Commissioners Unless, however, there are insuperable objections to it, there is no doubt that the simplest plan would be to allow the Select Committees of the Indian Legislature to submit their difficulties to the Law Commissioners through the Indian Legislative Secretary corresponding with the Secretary of the Commission, such correspondence being, if necessary, unofficial

It is not hard to divine some of the objections which may be felt or stated to establishing closer relations between the Commissioners and the Indian Legislature or any department of it It may be said that such relations are inconsistent with the position and functions of the Commissioners The Commission consists of eminent judges and lawyers appointed by the Queen to determine what, in their judgment, is the system of law fittest for India It may be argued that, when they have reported, their duties are finished, and that it is for the Indian Legislature to attach the proper weight, or to take the consequences of not attaching proper weight, to their dignity and experience

This view of the position of the Commissioners ought, in my opinion, always to prevent the Council or its Committees from asking the Commissioners to reconsider any proposal of theirs which lies wholly within the sphere of forensic or judicial experience If the Indian Legislature ventures to differ from the Commissioners on such a proposal, it ought to take on itself the exclusive responsibility of such difference But it hardly seems reasonable that a body which has the duty ultimately cast on it of clothing the proposals of the Commissioners with binding authority over Her Majesty's Indian subjects should be debarred from laying before the Commissioners the doubts which familiarity with native opinion and prejudice, or knowledge of some immediate political exigency, has caused it to feel in respect of some particular provision, or set of provisions, in the drafts The Committees of Council are not so constituted that the difficulties which occur to them can be treated with disregard So far, at all events, as concerns the Civilians who serve as Additional Members of Council, they are selected from the various provinces of British India for their large administrative or judicial experience, and this experience is always of the freshest, since, under the present system of constructing our legislative machinery, they are only engaged in legislative work during four or five months, and return to their proper local duties for the rest of the year

The objection may further be made that nothing like these proposed facilities of communication has been found requisite up to this time But my answer is, that nothing like the part of their work upon which the Indian Law Commissioners are now engaged has been undertaken by them up to this time The

Penal Code was framed in India, but, even if that be put out of the question, no population has the same feelings or prejudices about criminal law which it has about civil law The Codes of Civil and Criminal Procedure, drafted by the Law Commissioners in England, may no doubt incidentally affect native rights, and therefore native opinions, but they are mainly concerned with the mechanism of the Courts, and it would be absurd to lay down that the natives of India have any deep-seated feeling about the subject-matter of those Codes taken as a whole The Indian Succession Act, which follows the Commissioners' draft almost literally, consists nearly entirely of pure Civil Law, but it merely applies to the Europeans and Europeanized natives For the first time, in preparing a contract law for the whole of Her Majesty's subjects in India, the Commissioners address themselves to a subject on which the course of legislation may be strongly affected by native usage, native opinion, and by the local peculiarities of the country. It is no doubt perfectly true, as the Commissioners observe in their report, that there is a scantiness of substantive contract-law in India. There are, in fact, vast gaps in that law which might be filled up by almost any rules, but which the Commissioners propose to fill up by rules both reasonable and simple. But it does not follow that, in respect of certain limited branches of contract-law, there may not exist obstinate prejudices and tenacious customs The various forms of the contract of bailment are a possible example in point. I was myself much surprised by the strong statements made as to bailments by several Members of the Council of great local experience—statements confirmed, I should add, by the native Member of the Committee, a millionaire who made his fortune in business Moreover, in the papers which I now circulate, it is positively asserted by persons of the highest authority that a rule of great generality proposed by the Commissioners is sure to shock the moral judgment of the natives

Finally, the Law Member of Council is perhaps open to the remark that it is his duty to discover the reasons which have led the Commissioners to a particular conclusion, and to place them in the proper light before the Select Committee and the Council. I trust that the person in that position will always prove, to some extent, equal to this duty, and will not neglect it. But I have explained that the objections which give most trouble are those derived from local knowledge and experience, real or supposed Whatever be the consideration generally manifested towards him, a lawyer in India always contends at a disadvantage when he opposes the results indicated by the experience of English Courts, vast as that experience in reality is, to the results pointed at by personal experience of this country and its people

If these arguments for the establishment of an easier mode of communication with the Indian Law Commissioners do not prevail, we seem to be placed in this alternative—either the

reports of the Commissioners will get to be more and more considered as a mere draft for the Indian Legislature to work upon, or the Secretary of State will be driven to resort to Parliament for power to declare the Commissioners' proposals to be law at once, subject possibly to amendment by the Council for making Laws and Regulations The first result will, I am convinced, be ultimately most offensive to the Law Commissioners, the last, I am informed, is viewed with distrust by the authorities most responsible for the good government of India

The effect of sending home these papers will, no doubt, be to delay in some degree the enactment of the Indian Contract Bill But meantime the Negotiable Instruments Bill, which belongs to the same division of the Code, and with which hardly any progress has been made, can be taken up in Committee It is possible, too, that the political considerations which led the Select Committee on the Indian Contract Bill, and the Lieutenant-Governor of Bengal, to think it temporarily inexpedient to discuss the Specific Performance sections which may now be considered as practically included in the Bill, may have lost their force by the time the opinion of the Commissioners is made known to us

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No. 64

Act IV of 1869, Divorce

(11th August, 1867)

STATE to the Madras Government that in 1863 a Bill was submitted to the Imperial Council having for its object the establishment of a branch of the High Court in each Presidency with jurisdiction corresponding to that vested in the English Divorce Court Grave doubts arose whether any Court deriving its powers from Indian legislation had power to dissolve marriages between Europeans contracted out of India, at least so as to ensure the recognition of the dissolution by foreign tribunals Accordingly, the Secretary of State requested the postponement of the measure, with a view to legislation in the English Parliament A Royal Commission was subsequently appointed to enquire into the Law of Marriage and Divorce in India and the Colonies, and its report was awaited It has now been intimated to the Government of India that the Commission is not likely at present to take up the subject of Divorce in India, and there is no immediate prospect of Parliamentary legislation

Proceedings, Home Department, Ecclesiastical, August, 1867, Nos 23 24

Incomplete as any measure must be which fails to give relief to the large and increasing section of Her Majesty's Christian

subjects in this country who have contracted marriages in Great Britain, the Government of India is of opinion that, if there is much more delay, it will be driven to propose to the Legislature a Bill dealing with the subject to the extent of its competency

Meanwhile, having regard to the large numbers of Christians in the Madras Presidency, and to the variety of the sects believed to be found there, we should be obliged by the opinion of the Madras Government on the following points —

To what extent would a Court of Divorce consisting in effect of a branch of the High Court, but having jurisdiction over the whole Presidency, afford the desired relief?

If the relief would be inadequate, would it be safe to confer jurisdiction on the District or other local Courts, the issue triable by such Courts being not simply the fact of adultery, but such defences on the part of the respondent as condonation or cruelty?

If this last expedient seems inadmissible, would it be preferable to confine the jurisdiction to the High Court, but to allow it to delegate all, or part, of its jurisdiction to local Commissaries, specially selected?

And, generally, in what way can a system, affording ready and inexpensive relief as nearly as possible on the spot, be combined with the securities for justice demanded in a class of cases of peculiar difficulty and delicacy?

The Madras Government will doubtless bear in mind how desirable it is to provide, if possible, the same judicial machinery for all classes of Christians in India

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No 65

Judge Advocate General

(10th September, 1867)

Proceedings, Military Department, October, 1867, Nos 56-61

I HAVE long been of opinion that it is urgently necessary to place a professional lawyer at the head of the Judge Advocate General's Department at head quarters in India Several further changes will, in my humble judgment, be required before the system of military justice in this country is brought into a satisfactory condition, but the measure on which our views are requested by the Secretary of State is a first step in what I believe to be the right direction, and it appears to me to be imperative

2 The burden of proving that it is expedient to have a military man at the head of this department in India rests, I submit, on those who assert the expediency The Judge Advocate General at head-quarters in England is a professional lawyer

So also, if I am not mistaken, is the Judge Advocate of the Fleet If it be said that the army in India is rather in a position analogous to that of an army on a campaign, I reply, with His Excellency the Commander-in-Chief, that, in the last two European wars of any magnitude in which British troops took part,—the Peninsular War and the Crimean War,—the Judge Advocates General attached to the Commanders of the Forces were members of the Bar

3 It cannot be said that the reasons for administering military justice with regularity and precision are weaker in India than in England On the contrary, they are obviously much stronger A court-martial in India is the ordinary Criminal Court for the trial of civil offences committed by persons amenable to the Articles of War at a distance of 120 miles from a Presidency Town All the considerations which have led to the trial of persons committing such offences in England by the ordinary Criminal Courts make in favour of assimilating the military judicial system of India, as far as may be practicable, to that of regular civil tribunals

4 Nor can it be argued that, in consequence of the obscurity of military trials in India, a rougher system suffices for this country On the contrary, there is much more need here than at home for that attention to definite rule which is apparently necessary to satisfy the popular sense of justice Owing to the paucity of topics of interest in India, the public attention is fastened on military trials to a degree unknown at home, and the popular verdict is echoed in England, often too late for review or reversal

5 Abstractedly it seems to me almost as difficult to show that a military man should be at the head of the Judge Advocate General's Department as to prove that a lawyer would make a suitable Adjutant General My impression is that the subjection of the department to strict professional control has only been postponed from the difficulty which once prevailed in India of obtaining a competent lawyer for the office for anything like a reasonable remuneration

6 At the same time, I am anxious to state that I share to a considerable extent the opinions expressed by His Excellency the Commander-in-Chief in his letter of 5th February, 1867, to the Judge Advocate General in England I wish to separate myself from the popular assailants of the office, who base their charges against it on allegations of servility and incompetence

7 As to the imputation of want of independence, I will merely add to Sir W Mansfield's vindication the remark that the charge is one which it is necessarily very easy to bring against a military man, and which it is necessarily somewhat difficult for him to repel So long as subordination is among the chief of military virtues, so long indeed as it competes with courage for the first place among those virtues, the assailant of

the legal adviser of a Commander-in-Chief can always insinuate a charge by substituting a bad name for a good one, by changing, as Bentham would have said, a eulogistic into a dyslogistic term It is somewhat hard on the Judge Advocate General that he should be placed in the apparent dilemma (and I admit it is for the most part only apparent) of defending himself against the reproach of disqualification at the cost of disclaiming a high military quality

8. I have offered this observation chiefly for the sake of pointing out that the charge of want of independence is much less likely to be advanced against a professional lawyer in the position of Judge Advocate General Most assuredly the pursuits of a lawyer are no complete protection against the misleading influences of friendship, partizanship, or corrupt expectation. But unquestionably his professional instincts do to some extent protect him, and are popularly believed to protect him, against those influences The servility which a lawyer contracts in the practice of his profession is servility to certain definite rules, principles, distinctions, and doctrines The discredit which disregard of these canons, even through ignorance, hangs upon him, is as deeply felt as any professional penalty can be, and it is in truth the fear of this discredit which counteracts the evils attendant on professional advocacy when concerned with facts If there be any member of the profession to which I have the honour to belong who, for the sake of serving a friend or patron, would deliberately risk the imputation of having, in a professional opinion or judicial decision, propounded bad law, I can only say that I have not had the fortune or misfortune to meet him

9. On the accusation of incompetence, feeling as I do the futility of encountering a general charge by a general defence, I think it best to adduce my own experience I have not seen very much of the work of the Judge Advocate General's Department, but I have from time to time seen more or less of it, and what I have seen in no way bears out the asertion of incapacity It is in a high degree careful and minute, in truth, its faults are over-minuteness, and, if I may so put it, a certain disregard of the proportionate importance of the facts reported upon, the very faults, indeed, which might be expected in gentlemen engaged in a professional occupation, but deprived of the tests and correctives supplied by actual professional life and practice These defects, which prove nothing against the intelligence or knowledge of the department, but which certainly have a tendency to expose it to the imputation of occasional want of common sense, are not ordinarily found in a professional English lawyer, if properly selected Such a professional adviser would also be able to contribute a kind of assistance little likely to be obtained from the department as at present constituted He would be able to judge, not only what is the aspect of

alleged facts on paper, but what aspect they are likely to assume as orally described by witnesses, or as distorted and glossed over by advocacy, and what effect they are likely to have on a tribunal which, though undoubtedly more cultivated and more diligent in duty than average juries, has nevertheless many of those peculiarities of a popular tribunal, of which every legal adviser is practically obliged to take account.

10. The main ground on which I urge the advisableness of appointing a professional Judge Advocate General is identical with that taken up by Sir W. Mansfield. Whether the work of the Judge Advocate General's Department be good or bad, the popular want of confidence in it produces fruits which seem to me in the highest degree injurious. What I assert is that the Commander-in-Chief in India is practically made responsible for the due discharge of duties which the theory of military justice does not impose on him. That theory I believe to be that, on all technical questions, the opinion of the Judge Advocate General is conclusive, and that the province of the Commander-in-Chief is to take opinion or decision just as it is given out of the hands of his legal adviser, and then to consider what practical application it shall receive, regard being had to the interests and morality of the army under his command. But I am quite unable to discover that the boundaries between these functions are in the faintest degree recognized by popular opinion, which seems to me systematically to confound the question whether a right discretion has been exercised with the question whether a right judgment has been formed upon evidence or law. There appear to me to be but two ways of explaining this. Either the opinion on technical points is supposed to have been dictated by the Commander-in-Chief from the first, so that he is practically responsible for it, or else the opinion is believed to be without value in itself, so that the Commander-in-Chief, however little his previous habits of life may have qualified him for such enquiries, is thought just as capable of investigating the merits of the question solved as the author of the solution. In other words, we are brought round to the alternative charge of servility or incompetence.

11. It seems to me the merest justice to the Officer Commanding the Forces in India that he should be relieved from responsibilities which neither the theory nor the necessary incidents of his position require him to satisfy. On all technical questions—questions of the soundness of particular legal propositions—of the sufficiency or insufficiency of certain testimony to sustain a particular conclusion,—of the propriety or impropriety of admitting or rejecting certain evidence,—the opinion of the Judge Advocate General should be regarded as, if not necessarily impregnable, at all events sufficiently solid to completely justify the Commander-in-Chief in making it the basis of ulterior action. It is idle to say that the opinion of a lawyer of

good repute would not be accepted as such a justification Every day in England, both in public and private life, men are held blameless for particular lines of action because they have had recourse to the best legal advice at their command The Commander-in-Chief, so advised, and acting on the advice received, would, if censured or condemned, be rightly censured or condemned in the opinion of all, for his error would necessarily be committed within that sphere of discretion which is properly reserved to him

12 I think it right to add that I do not anticipate much difficulty in finding a competent English barrister for the office at a not extravagant salary Few legal appointments in India would probably be pleasanter than that of Judge Advocate General at head-quarters The duties, though no doubt they would afford ample occupation, would hardly be difficult or troublesome to a barrister accustomed to English practice. Apart from the Law of Evidence, the law which the Judge Advocate General has to apply is mostly contained in Statutes and lies within comparatively narrow limits As to evidence, knowledge of it and skill in appreciating and manipulating it are probably more widely diffused among the English Bar than any other legal accomplishment. I have no doubt that there would be many well qualified candidates for the appointment. It seems to me, however, essential that part of the remuneration should consist in a retiring pension, to be earned after service of a certain number of years

13 The opinion of His Royal Highness the Duke of Cambridge, that the Civil Judge Advocate General should be assisted by a Military Judge Advocate, has in its favour, besides other arguments, the consideration that the department would embrace a functionary who could officiate for the Judge Advocate General during unavoidable absence on furlough or through sickness The difficulty of obtaining barristers to officiate in temporary appointments is daily becoming more formidable in India

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No 66.

Decentralization of Finance.

(13th September, 1867)

I must apologize to the Viceroy and my honourable colleagues for taking precedence of them in recording my opinion on the financial changes proposed by Colonel Strachey under the authority of the Financial Member My excuse must be that I leave India in a few days, and shall lose, for a time at all events, the power of giving my

Proceedings, Financial Department, Accounts, October, 1867, Nos. 22-27

adhesion to a proposal in which I take great interest, and which I believe to be of signal importance The few words I have to write will be confined to the principle and general character of the plan, all discussion of detail had better, in my judgment, be postponed till the opinions of the Local Governments have been received

I do not think that anybody can have observed the recent workings of our system of financial control without coming to the conclusion that, if it be not on the point of an inevitable collapse, it is at all events in great danger of going to pieces, unless the strain be lightened somewhere The rules imposed on the Local Governments depend for their force, like all laws, on the efficacy of the penalty which they threaten in the event of disobedience The penalty is, in the present case, a reproof from the Government of India. But if any Local Government has become—what any Local Government might become at any day—entirely callous to the rebukes of the Government of India, through discovering—what any Local Government may at any time discover—that these rebukes lead to no ulterior consequences, what impediment remains to the employment of one or more among the hundred expedients by which the Central Government may be morally compelled to condone infractions of its rules, and to allow the share of its revenues which it has allotted to a particular province to be exceeded? It is hardly matter of wonder that Local Governments should learn this lesson India is now very near England, Indian affairs are much discussed in public, the opinions of authorities to which this Government is subordinate are frankly declared and widely disseminated, and thus the head of a Local Government must be very dull indeed who does not gather that our rules of financial control are losing credit in the very quarters in which, if they are to be rigidly enforced, the belief in their usefulness ought to be strongest

It seems to me very poor statesmanship to neglect such considerations Our system may be good or bad, but, even if I believed it to be more perfect than I do, I should say that it was time to alter it if the means of applying it in its integrity were failing us

But my belief is that it goes to undue lengths in what it attempts, and miscarries miserably to the extent of the excess

The proposal before us, which appears to me to be as remarkable for its moderation as for any other characteristic, is to transfer to the Local Governments certain items of charge and income which, if the accounts of the present year be taken arbitrarily as a basis, almost exactly balance one another The items of charge transferred are those over which, from the nature of the case, the Government of India can exercise no control, or next to none The items of revenue are those which no action of the Government of India can render more fruitful

If we now wish to augment the last or diminish the first, we must work exclusively through the Local Government

I must maintain my opinion that the principle sought to be applied has been long since recognized, and that the practical effect of what is proposed to be done will be simply to increase those local funds on which the Local Governments set the greatest store, which they have the strongest inducement to economize, and which nobody suggests should be taken from them I can discern no test whatever of a local fund, other than a municipal fund, except that it is wholly raised in a particular province, and wholly expended in that province under the authority of the Government of the province Its legislative origin counts for nothing, because, in fact, there are many sources of imperial revenue which were at first of local origin, and not a few local imposts are, as may be seen by glancing at even recent enactments, levied under imperial authority. Now, the funds and parts of funds which Colonel Strachey proposes to transfer are wholly raised within the province, when the transfer has been effected, they will be wholly expended in the province under the allocation of its Government. No criterion of a local fund will, as it appears to me, be wanting

A good illustration is furnished by those cesses for local purposes, such as education, which are levied on land in certain provinces of India. They constitute a clear addition to the land-revenue, and to the tax-paying agriculturist it is indifferent whether they are reckoned separately or lumped in his aggregate payment It appears to me that the part of the land-revenue which the plan before us proposes to separate from the rest and to allot to the Local Government for local purposes is exactly in the same position as these cesses In truth, the fraction deducted is partially to be spent on precisely the same objects,—for instance, roads Call it indeed a cess, and the question, which is purely verbal, is ended

If it be established that these proposals do in effect only augment local funds,—funds, that is to say, raised in the province for objects confined to the province,—it seems to me that we may safely in the end augment them up to the amount of the English county expenditure, compared with which the revenue proposed to be immediately transferred is quite trivial All the reasons which make in favour of our retaining so large a proportion of the revenues of India in our hands seem to me to be arguments for placing the English county expenditure under the direct control of the House of Commons Indeed, the latter class of arguments are rather the stronger, since it may be said that the payers of county rates are much more truly represented in Parliament than among the authorities which levy and disburse those rates If, however, an attempt were made to give effect to such arguments, the reply would be that the Treasury and the House of Commons have quite enough to

do already, and that local watchfulness, even by a defectively-organised body, is always more effectual than central control exercised under the disadvantages which are inherent in such control I am unable to see why the force of this reply is wholly spent in India

The argument derived from the alleged extravagance of the Local Government seems to me to be pushed a good deal too far, but, admitting within limits the fact of such tendency to extravagance, I regard it as the natural fruit of the present system I suppose that it will be conceded that both men and Governments discharge a clear duty better and more completely than a remote, obscure or contingent duty Now, the clear and primary duty of a Governor or Lieutenant Governor is to promote the moral and material prosperity of the population under his government On the other hand, the duty which the Government of India has imposed on itself, and which no doubt it conscientiously tries to discharge, is to regulate the expenditure on the objects sought to be promoted by the Local Governments on principles determined by the financial necessities and the financial condition of the Empire as a whole No doubt it is the duty of the Local Government to observe the limitations imposed on its legitimate ambition by the Government of India, but this is a duty of a very different and much more indistinct kind than that of doing palpable good to a subject population For my part I do not greatly wonder that a Local Government should try to get all that is to be got, and should not be very scrupulous in its contrivances for getting it

I imagine myself to have only put into other words what Colonel Strachey means when he says that Local Governments have as yet to acquire the sense of financial responsibility How that sense is to be created, except by some such plan as is before us I cannot see, and have never heard explained

It seems to me too hastily assumed that the nearly exclusive control now enjoyed over the finances by the Government of India results necessarily and inevitably in economy For the Government of India, as at present constituted, it may, I think, be fairly claimed that, while it is free from the bias of local interests, it has no special tendency to extravagance peculiar to itself But the truth is perpetually before us that the Indian Government, in all its parts, is one of the most ephemeral in the world Five, ten, or fifteen years hence we may have a Governor General with special crotchets—let us say military crotchets—which, falling in, it may be, with popular fancies, may lead him into expenditure transcending the most wanton extravagance of all the Local Governments together, and for which, moreover, there would be nothing to show when it was over

I see positive advantage in curtailing to some extent the proportion of the revenues of India at the absolute disposal of

the Central Government, and in finally appropriating a considerable part of those revenues to the needs of Local Governments I can quite conceive a campaign on the Oxus or the Jaxartes being undertaken with less precipitation if the Supreme Government had lost the power of summarily stopping all public works throughout India, and could only pay for military glory by—borrowing or taxation If the Indian public debt be analysed, I venture to say that, putting aside the results of the events of 1857, it will be found to have been mainly incurred through imperial, and not through local, extravagance

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No 67

DRAFT BY MR MAINE OF DESPATCH RESULTING IN STATUTE 33 VICT, C 3, SS 1 AND 2

(10th January, 1868)

No 19, dated 12th January, 1869

[Political]

TO

HER MAJESTY'S SECRETARY OF STATE FOR INDIA

MY LORD DUKE,—With reference to the fifth paragraph of your predecessor's despatch No 182, dated 30th November last, in which Sir Stafford Northcote observes that he does not trace the effects of over-refined legislation in the Agror outbreak, but rather the results of certain incautious executive measures, we have the honour to state that we entirely concur in this view We had no intention of implying in our despatch of September 2nd, 1868, that "unsuitable laws and regulations" had any share in producing the disaffection of Atta Mahomed Khan or the inroad of the border tribes We will proceed to explain more fully the course of our reasoning which, in our former despatch, was briefly indicated by a reference to the abusive exercise by Atta Mahomed Khan of certain powers confided to him by the Government of the Punjab

Proceedings, Foreign Department, Political, January, 1869, Nos 173 and 174.

We have to point out to Your Grace that, on the annexation of a new territory to British India, many difficulties arise as to the status of its population which are of a legal character, but which, however unfortunate it may seem, must nevertheless be dealt with under our present system of government and administration The new territory becomes part of Her Majesty's Indian dominions, its inhabitants become Her Majesty's subjects, the Council of the Governor General for making Laws and Regulations becomes the sole authority which can legislate for

legalizing such experiments, and in fact the legislative machinery which we prefer for these wild territories, and which we recommended to Sir Stafford Northcote, would differ only from the executive machinery now applied by the Punjab Government in its securing a greater degree of caution and deliberation for all measures that might be adopted towards the chiefs and people

(*See No 69*)

No 68.

SECUNDERABAD; SOVEREIGNTY

(16th February, 1868)

Proceedings, Foreign Department, Judicial, March, 1868, Nos 2-4.

BY successive Acts of Parliament, all "servants of Government" in India, but not in British India, have from a remote period been made subject to the enactments of the Governor General in Council This legislative power has been subsequently extended so as to embrace all European British subjects in Native States, and I hope it will soon cover all native subjects also

Parliament has therefore placed an obligation on the Resident at Hyderabad to obey the directions of the Indian Legislature in his character of a "servant of Government," this obligation is also one not to disregard, evade, or supersede those directions.

I do not enter into the questions of the effect of this Parliamentary provision on the quasi-sovereignty of Native Chiefs It might be contended that, to the extent necessary to give effect to the Act of Parliament, the British Government has appropriated to itself a portion of the sovereignty over the Native States sufficient for the purpose But the question does not arise here, there being no allegation of the Nizam's non-acquiescence in any proceeding of the Resident in relation to the administration of justice in Secunderabad

The Advocate General might, therefore, have stated his conclusion even more strongly than he has done

But I agree in the practical expediency of the measures taken by the last two Residents Military Courts of Requests are at best but a makeshift, and they are peculiarly unfit to try demands for large amounts

I suggest that there should be a short enactment repealing section 17 of Act XI of 1841 in all cantonments in which the Governor General in Council shall notify its *non-operation* The ground of such an enactment would be the prospect of the

Government of India arranging with certain Native Chiefs for a system of justice conformable with European ideas

I understand there is to be no objection to the Small Cause Court jurisdiction so far as it extends It must always, however, be remembered that this jurisdiction does not (except in the Presidency-towns) exclude that of Military Courts of Requests convened under section 99 of the English Mutiny Act, which the Indian Legislature cannot repeal or modify I greatly regret that this jurisdiction, limited to Rs 400, has not been excluded in all places in which a Small Cause Court has been established

At best we shall have three jurisdictions in each cantonment —

(1) Military Court of Requests for demands against persons amenable to English Mutiny Act up to Rs 400
(2) Small Cause Court for persons just mentioned as respects demands between Rs 400 and Rs 1,000, and for all other persons from the smallest sum up to Rs 1,000
(3) The new jurisdiction in regard to all demands beyond Rs 1,000

(*See Nos 22, 24 and 72*)

No. 69.

STATUTE 33 VICT., C. 3, SS 1 AND 2, BENGAL LEGISLATIVE COUNCIL

(*27th February, 1868*)

Proceedings, Home Department, (Legislative), March, 1868, No 155

MY opinion on many of the questions put to us by the Secretary of State will necessarily possess much less value than the opinions of those of my colleagues, who have had a larger experience of India I have, however, been nearly six years in charge of the Legislative Department of the Government of India, and I may, therefore, venture to claim some degree of attention for the conclusions I have come to on the points raised by Sir Stafford Northcote in his 16th and 19th paragraphs, which relate to suggested changes in the machinery of legislation

I am strongly in favour of restoring to the Executive Government that power of legislating for the less advanced portions of the country which it once possessed in fact It might, perhaps, be enough to point out that, if there had not been a general belief in the existence of that power, there would almost certainly have never been a formal Legislature in India Lord Dalhousie, when he pressed for the establishment of the first Legislative Council, unquestionably believed that his Government possessed the same legislative authority over non-regulation territory which the Crown exercises over Crown Colonies up to the moment of ac-

cording to them distinct legislative institutions The legal correctness of the doctrine on which this claim to legislate "executively" rested was, indeed, strongly denied by my predecessor in office, Sir Barnes Peacock, but, in practice, the Government continued till 1861 to act as if it possessed the power in respect of all the outlying and newly-annexed provinces At length, however, the Indian Councils Act of 1861, according to the better construction of its language, took away from the Executive Government all legislative authority over non-regulation territory, at the same time that it gave the force of law to all the rules which had been made in the belief that the authority existed The intention of the Statute of 1861 seems to be that local Councils shall gradually be established in all the provinces of India As a matter of fact, however, it has not yet been found possible to establish a local Legislature even in a part of the country so long settled and so well understood as the North-Western Provinces, and the result is that no new law or rule which is required for any province other than Madras, Bombay and Bengal proper can be sanctioned by any authority in India other than the Supreme Legislative Council, sitting usually for three or four months in the year, and almost exclusively at Calcutta

The absolute denial of legislative power to the Executive Government, as it affects the wilder and less civilized portions of India, is most inconvenient, and, I venture to think, most dangerous, for it comes to this, that the Executive Government can do no act unless there is a known rule to back it This might be all very well if India was—what China was once supposed to be—a country in which there was a rule for every possible contingency But the government of the country is an experiment conducted under perpetually changing conditions Those who know most of the people in the outlying provinces probably know but little of them, mistakes are constantly discovered which ought at once to be corrected, peculiarities of character and feeling unknown before have suddenly to be allowed for, and new circumstances arise to which measures must be moulded As matters stand at present, the Government can do nothing without coming to Calcutta for a formal law, the reasons for which it is often not easy, and occasionally not safe, to assign Moreover, the law in question has to be asked from a Council which is not really responsible for the peace and good government of the territories to be legislated for No doubt in practice the Legislature shows great good sense by accepting these laws from the local functionaries without questioning them Still, it is just possible that a law imperatively required for the safety of the trans-Indus Frontier or the peace of the wild country in the Central Provinces might be refused, and, if so, what responsibility could be fixed on the members of the Civil Service from Madras, Bombay or Bengal proper, or on the gentlemen belonging to the Calcutta mer-

cantile community who sit in the Council? Yet public opinion in England exacts from the Executive Government of India the responsibilities of a despotism—even over the more settled provinces to a much greater extent than is commonly believed here—over the wilder provinces absolutely

Nor must it be left out of account that the public debates in the Council, which, in my judgment, have an excellent effect (so far as they go) on the civilized and settled provinces, might do us great injury in the rest of India, to which they are sure to penetrate, if they do penetrate, in a distorted and falsified shape

To the other question asked by the Secretary of State—Shall the local Bengal Legislature be abolished, and its functions transferred to the Supreme Council?—I am compelled to give a very decided answer in the negative I greatly regret that on this point I am at issue with His Excellency the Viceroy

His Excellency has remarked that the Bengal Legislative Council does not possess the same weight as the other local Legislatures I certainly have observed that there has been in some quarters much disparagement of the Bengal Council, but I strongly suspect that if we knew more of the Madras and Bombay Legislatures, we should find them not less roughly treated by the local Press There is one additional reason for not giving any extraordinary weight to these adverse criticisms Their authors are obviously, and no doubt honestly, desirous of chaining the Government of India to Calcutta, and no more promising expedient could be devised for this object than compelling the Supreme Council to undertake the whole local legislation of Bengal proper I quite understand, at the same time, that the Viceroy has very different objects in view when he proposes the suppression of the local Council, and it is curious to reflect how very little pleasure it would give to the assailants of the Bengal Council to be taken at their word in the sense in which His Excellency would take them

Looking simply at the proposal to suppress the local Council and transfer its duties to the Supreme Council, I am opposed to it on a variety of grounds Speaking from my own observation, I think the Bengal Legislature does all its work reasonably well, and a good deal exceedingly well And, whether it does it ill or well I am quite sure that the Supreme Legislature would do it a great deal worse It is, indeed, possible that the local Council sometimes addresses itself to subjects which could be better disposed of by the Governor General's Council But, if that be so, the fault is attributable to the Supreme Government and Supreme Legislature, since the Supreme Council can take any subject it pleases out of the hands of the Bengal Council and can supersede or repeal its legislation

The effect of the transfer of the Bengal business to the Supreme Council would be, as far as I can see, to break it down

altogether. In my humble judgment, we have already too much in the Supreme Legislature of what I hope I may call without disrespect the "parish vestry" business of the North West, the Punjab, and the Chief Commissionerships. There is before us at the present moment the most important law which it has ever been proposed to apply to India, not even excepting the Penal Code. The Indian Contract Bill, which the Indian Law Commissioners have prepared, and which we hope to apply to all classes in India, will affect the every-day transactions of one of the most industrious populations in the world, and most thoroughly imbued with the commercial spirit. It would not be too much to say that, if the Select Committee on this Bill met during every working hour of the week, it would not be time wasted, yet I have not been able to allot to this Committee more than one afternoon a week, merely because we are busy in discussing such questions as what is the best way in which Municipal Committees in the North-West can abate petty nuisances, and under what restrictions they shall be allowed to borrow money and for the digging of tanks. The legislation of the Bengal Council would be a crushing addition to our work. It must always be very heavy, for Bengal proper is a law-abiding province, and it must also be very minute, since it will have to govern the concerns of a population with a very decided turn for law, and since it will be exposed to examination by dignified Courts composed of subtle and wary lawyers.

I object further to the proposal because it will entail a very unsatisfactory change in the composition of the Supreme Council. Nothing to my mind can be plainer than the principles on which that Council should now be constituted. We require gentlemen who can explain the practical difficulties which attend the application of laws to parts of India in regard to which European experience or received European principles play us false. We require to know what view of a tax will be taken by a half reclaimed Pathan marauder on the other side of the Indus, what will be the effect on Marwaree traders in Guzerat of a change in the law of negotiable instruments, what difficulties will arise from altering the received rule of "market overt" among the cattle-stealing populations on the border of the Native States. We need the aid of authorities on the intricate land-revenue law of the temporarily-settled provinces, on the heterogeneous land tenures of the Punjab and North-West, and on the multitudinous family and clan customs characteristic of all North-Western India. But if we undertake to legislate for all Bengal proper, we must, in justice to that wealthy and civilized Province, half fill the Council with Bengal civilians and educated Bengal natives—classes both so leavened with European ideas that they will be of little or no use in helping us to ascertain the modifications of first principles which are the conditions of their application to India as a whole. Speaking from my own experience,

I should say there would be no more dangerous ingredient in the Council than a large number of educated Bengali natives Nobody charged with the conduct of the Legislative Department will ever fail to be inundated with their proposals for legislative innovation, and, if those proposals are serious, all I can say is that there are many of them which Bentham himself would have thought premature

Conversely, I think, Bengal will suffer from not having liberty to discuss and enact a certain class of measures in an assembly composed of Native and European gentlemen exclusively familiar with the province and the people. The province stands by itself, in respect of the character of the native population, the large admixture of Europeans, the peculiar nature of the revenue settlement, and the absence of institutions which are the basis of society in other parts in India Many things are practicable in Bengal proper and many things are desirable which are not practicable or desirable elsewhere I do not see why the moral and material progress of Bengal should be impeded by the doubts of gentlemen intimately acquainted only with the less intellectual and less supple populations of Upper India

So far from compelling the Supreme Council to undertake more local legislation, I would gladly see its functions narrowed in the main to the consideration of financial measures and of the portions of the Code successively sent out to us by the Indian Law Commissioners I am sure that all the time economized through the diminution of local legislation would be well expended on the measures I have mentioned Wherever the power of summary legislation cannot be reasonably exercised, I would establish a small local Council, only avoiding the mistake into which the present local Legislatures seem to me to have fallen of having regular and periodical sessions I entirely agree with Sir W Muir that the North-West is entitled to a local Council, but it should only meet when legislation is actually wanted, and should not always sit with open doors

The Viceroy, in advocating the abolition of the Bengal Council, contemplates further changes which would, to a certain extent, obviate the objections I have taken He would "grant the power of summary legislation for the whole of the Bengal Presidency and its dependencies" And he would, no doubt, say that a great deal of legislation would be got through under the summary power, so that no great additional labour would be thrown on the Supreme Council

His Excellency will pardon my arguing that, so far as regards Bengal proper, the change he proposes, which is certainly very serious, is also of very doubtful expediency Nobody with the least self-respect would care to echo those assertions of the inherent rights of Englishmen which are sometimes current here Yet, in settling the legislative mechanism fittest for this prov-

ince, we cannot quite put aside the fact that the powerful class consists of Europeans, and of educated Natives who, when their interests allow it, write, talk and think as much like Europeans as they can We cannot give this class representative institutions, but it is a very serious matter to withdraw from them a formal Legislature when they have once had it, and to subject them to that concrete form of despotism which consists in the complete blending of executive and legislative power

No doubt there would still remain the Supreme Council But it would only be called into action when the Executive Government chose, and I presume that it would never have measures submitted to it on which the Government disliked debate, or to which it feared serious opposition Now, to take the last contingency first, the cases in which the Government could not carry a measure either in the Supreme or local Council by putting forth its full strength must always be very rare, and, if they did occur, I should venture to think that there was a good deal to be said on the side of the opposition, and, under any circumstances, I think it would be much better undisguisedly to pack the Council than to dispense with its share in legislation The other advantage to be gained—the avoidance of public debate—is, in my mind, the reverse of an advantage in the more civilized provinces So far from its being desirable that we should legislate without giving reasons for our legislation and without meeting objections to it, it seems to me that the want of power to defend our measures is our great weakness. We stand alone among the Governments of the civilized world in having no means, except the most indirect, of correcting the honest mistakes or exposing the wilful misrepresentations of a completely free Press It would be unjust to say that we are always unfairly treated, but the Governmental side of most of our measures is seldom perfectly brought out, and not at all when those measures are unpopular Yet it is quite idle to say that the public opinion which is thus arrayed against us is of no importance to us It penetrates to England through the compendia of Indian newspapers which circulate there, or through the correspondence of the English Press Languid as is the interest of England in India, English opinion of public measures and men in this country is apt, on the whole, to follow Indian opinion, which thus becomes a real power So far from thinking it desirable to add to the weakness of this Government by placing it under a temptation to shrink from publicity, I would myself prefer to relax in some degree the precautions taken in the Indian Councils Act to prevent the Indian Legislature from giving itself the airs of a Parliament, and I should like to see effect given to the proposal of one of our colleagues that even executive measures should be occasionally discussed in public, provided that it were done by the express permission of the Governor General, and only in the Supreme Council

When I say that I am rather in favour of multiplying the local Councils than of diminishing their number, I must not be understood to argue against a measure of a very different kind —the drafting or revision of all local legislation in the Legislative Department of the Government of India Some such expedient for securing technical uniformity in legislation seems to me very desirable, and I hope shortly to circulate some proposals on the subject

I do not propose to give any opinion on the other questions asked by the Secretary of State until I have had the advantage of reading the Minutes of those of my colleagues who have had an exclusively Indian training But a fact bearing on one of these questions is conveniently mentioned here, because it has been exclusively brought home to me by my experience in the Legislative Department

Nobody who has watched the changes which have occurred during the last five or six years in the composition of the Legislative Council can fail to have been struck by the steady deterioration, in point both of social rank and of mental calibre, of that native element from which so much was at first expected and to which so much importance is still attached at home When the existing Legislature was first established, it included a sovereign prince, the first statesman of the native territories, and a wealthy gentleman, of an historical family, of much influence with his countrymen, and of singular sagacity We have now two Bengali gentlemen, of whom one was for many years of his life a Government servant, and a zamindar from the North-West—all three very respectable, but none of any extraordinary weight The result of my experience during these five or six years is, that we cannot get the men we want, and that, when we get them, we cannot keep them, or have the greatest difficulty in keeping them

His Excellency the Viceroy has the nominations to the Council entirely in his hands, and it is to him that applications for his sanction to the departure of native Members are addressed He is aware how many times and by whom the seats in Council have been declined, and whether or not the native members exhibit anxiety to get away I shall be surprised if he has not observed that there is the utmost reluctance to come, and the utmost hurry to depart, and if he does not attribute both to the fear and detestation with which the climate of Calcutta is regarded by all natives of India not born in Bengal, or, indeed, in the vicinity of Calcutta itself We have seen a semi-sovereign chief reduced by these feelings to such a pass that, after two or three days' stay, he slipped away in the night, leaving a medical certificate behind him, and I state the impression repeatedly made on myself when I say that the discomfort of those native members who do remain is sometimes quite pitiable

I am expressing no opinion on the value of the native element in the Council, and no final opinion on the question of the seat of Government There are many considerations which obviously make in favour of keeping the Government of India in Calcutta during at least a part of the year, and, speaking from the point of view of my own duties, I attach great importance to the influence of the legal opinion of Calcutta on our Codes, and of its mercantile opinion on our fiscal and financial legislation But if the fact which I have noted—brought home to me as it has been by certainly a limited, but still a very marked and peculiar, experience—be really a fact, it seems altogether absurd to leave it out of account in arguing the question of the future seat of Government It may be proper or quite inevitable that Englishmen should sicken or die in Calcutta, or those again may be right in whom the denial of its salubrity appears to excite a very sincere indignation But it is surely a strong thing to assert without hesitation or reserve that Calcutta is the best or the only possible capital, if it be true that the vast majority of those who are to be governed from it refuse to come near it There is another country—Italy—in which the "question of the capital" is also the question of the day The difference between the two cases is that Rome has a history, and the Italians beyond all doubt wish to go there, whereas it is really difficult to say that Calcutta was ever the theatre of any occurrence more considerable than the tragedy of the Black Hole, and the natives of India appear to be desirous of keeping as far away from it as they can.

(*See No 67*)

No 70.

GOVERNMENT OF BENGAL, SIMLA, CALCUTTA.

(*16th March, 1868.*)

MY observations as to the constitution fittest for the Local Government of Bengal must necessarily be of a somewhat general character, and will, therefore, contrast disadvantageously, perhaps, with the opinions of gentlemen who speak from personal knowledge of the details of administration

Proceedings, Home Department, (Legislative), March, 1868, No 158

I must confess that the very strong case made by the present Lieutenant-Governor for placing Bengal proper under a Governor in Council does not seem to me answered in the Minutes recorded by Members of the Government of India, and I venture to think that in those Minutes much too little stress is laid on the presumption against the continuance of the

Lieutenant-Governorship arising from the terrible calamity which occurred at the close of the last incumbency That presumption is so strong that I regard the proposal to restore the Government of Bengal to the Government of India, or to make the Lieutenant-Governor a Member of the Executive Council, as in itself more logical than the conclusions of those who would either do nothing or carry out some small improvements in the Bengal administrative system I perfectly agree with the Viceroy and my honourable colleagues in thinking that a closer union between the Government of India and the Government of Bengal would probably end in breaking down both Governments, but still there is a certain congruity between the magnitude of the proposal and the greatness of the occasion

His Excellency the Viceroy has, indeed, contended in effect that, if the late Lieutenant-Governor had been other than he was, the disaster in Orissa would have been otherwise dealt with This is probably true, but it is also true that the appointment of Sir Cecil Beadon to the Lieutenant-Governorship of Bengal six years since was perfectly inevitable As far as I know, there was no conceivable competitor for the office, and neither the present Viceroy nor any other could have made a different selection No one under present circumstances need be afraid of praising Sir Cecil Beadon, and, therefore, I will say that I do not happen to have met anybody of higher capacity, versatility, and resolution Who could have predicted that the serene courage which (as Sir William Mansfield, who ought to know, tells us) sustained him and others during the mutinies would degenerate into unreasonable reliance on the infallibility of a subordinate department? I am not aware that there is any known contrivance for correcting this species of vicious bias even in men of strong character and great ability, except forcing them to place themselves in contact and even in collision with other minds, possibly of inferior calibre I will even say that, though a Lieutenant-Governor had been selected who would have done more than Sir Cecil Beadon to mitigate the Orissa calamity, it is more than probable, considering the complex nature of all Bengal questions, that he would have fallen into formidable errors of another kind, and would equally have been the better for a Council.

It is further contended that, if Sir Cecil Beadon had had a Council, the Members of the Board of Revenue would have been his Council, and the same results would have followed It seems to me just as likely that one or more of the gentlemen now on the Bench of the High Court would have been in the Council, but, even granting that the very gentlemen who constituted the Board would have been Sir Cecil Beadon's councillors, it does not seem to me at all probable that their common deliberations would have ended in the same way as their correspondence at arms' length But the facts and the probabilities appear to

point in the other direction So far as any one incident in that sad history can be marked out from the rest as the one great source of misfortune, it was the despatch of the telegram in which the Board, speaking in the name of the "Government," peremptorily declared that no grain should be imported I look upon it as all but impossible that, if the Lieutenant-Governor and the Board had been combined in a corporate Government, this telegram could have issued without the Lieutenant-Governor's knowledge, and Sir Cecil Beadon has distinctly stated that he disapproves of the intimation which it gave, and that, if he had been consulted, he would never have allowed it to go out To what extent the course of events would in other respects have been changed by the closer union of the Board with the Lieutenant-Governor can of course be only matter of conjecture, but that it would have been materially changed seems to me in a high degree probable Sir Cecil Beadon displayed undoubtedly a too sanguine confidence, but he had not a particle of that tenacious faith in semi-scientific conclusions which characterized the Board Had he stood in more intimate relations with its members, I think it likely that he would soon have found out how much of their opinion depended on facts and how much on deductions from principles assumed *a priori* to govern the particular case.

No doubt the argument which I have just used may be turned against me, since it may be said that it at most proves the expediency of abolishing the Board, and I admit that this hypothetical case is an instance in which the Governor could probably have been more in the right than his Council Councils are, however, instituted on the assumption that Governors are occasionally wrong, and require to have their views tested by attrition against those of other men They are in the nature of an insurance against risk, sometimes the risk entailed by incompetence in the Governor, but sometimes also the risk entailed by ability, coupled, as it may be, with lack of experience or one-sidedness A member of an Indian Council can hardly contend for the value of the institution without ill grace or impropriety, but I may fairly point to the success of the Madras and Bombay Governments The system of Lieutenant-Governorships is after all extremely recent, and, if it has exhibited some examples of brilliant success, it has also exhibited one terrible miscarriage. But, through considerably more than a century, the Governors in Council of Madras and Bombay have successfully conducted those Governments through difficulties scarcely less than the difficulties with which Governors General have had to contend in Upper India I confidently assert that much of this success has been owing to the Councils We have ourselves known some able and eminent Governors of minor Presidencies, and we have read of others, but it is impossible to read down the list of Governors without seeing that

the great majority were not men of any mark If, however, the system of Governors in Council has enabled a series of mediocre men to carry on a difficult government for a century with great success as the ultimate result of the experiment, I really do not know what higher praise can be deserved by any political system

If, however, a Council be good for Madras and Bombay, I venture to think it much more urgently needed for the Governor or Lieutenant-Governor of Bengal proper The state of society in the minor Presidencies is comparatively uniform, and the questions to be dealt with are simple In both Presidencies almost all the land is in the hands of a peasant proprietary Except in a small part of Madras, the Europeans are collected in the Presidency-towns, their interests scarcely ever conflict with those of the natives, and in Bombay the moral gulf between the races is bridged over by the Parsees But in Bengal the problems are complex, many sided and of extreme difficulty. There is scarcely a single question which has not a European side and a native side, a proprietor's side and a tenant's side, which has not to be regarded from the point of view of the educated and progressive section of Bengali society, and again from the point of view of rigid Hinduism He will be a bold man who pronounces an unqualified opinion on any Bengal question, and not a wise one who thinks that many of them can be solved without adjustment and compromise No one mind can be trusted to make proper allowance for all the elements in such problems To put the case as strongly as possible, I cannot admit that, even if it can be predicated of a particular person that he would have saved half the lives lost in Orissa, he ought, therefore, to be left to himself as Governor of Bengal

And here I may remark that I do not precisely understand what is meant by a Council of Secretaries If it is a contrivance for shackling the freedom of advice by giving the Governor advisers who may be dismissed at his pleasure, or who may look to him for preferment, I think it is little to be desired The principle on which a Council should be formed seems to me sufficiently plain It should be in a position, not only to give, but to obtrude advice, but it should not be allowed to compromise the policy of the Governor, or to obstruct a course of action once distinctly determined upon by him The procedure which the Governor General and the Governors have to follow in over-ruling their Councils does seem to me somewhat cumbrous and antiquated, and I should gladly see it simplified by Parliament

A Council organized in the usual Indian way has gradually and insensibly become something more than a merely consultative body It has become a very excellent contrivance for dividing the labours of Government without at the same time

entailing that wide separation of departments which is characteristic of the Cabinet system. In India, at all events, the boundaries of departments are to a great extent artificial, and much time, paper and red tape are saved by a system which enable the Members of Government occasionally to overleap these boundaries The present Lieutenant-Governor, than whom probably none of us have known a more conscientious worker, assures us that with a Council he may hope to dispose of the business of his Government—business of which the extraordinary amount, as disclosed in Mr Grey's Minute, is probably a surprise even to those among us who were most prepared for the truth

As an English Member of Council, I may state my strong impression that the concession of a full Government to Bengal proper will have a very wholesome effect on English public opinion, which knows little of Lieutenant-Governors, but understands a Governor pretty well, and which will accordingly cease to impose on the Government of India a responsibility in respect of Bengal proper which it is absolutely impossible for us to discharge

If effect be given to the views of the present Lieutenant-Governor of Bengal, I do not think that we need fear to face the consequences, even though they should amount, in the words of His Excellency the Viceroy, to making the Governor General Governor General only over the North-Western Provinces and the Punjab It may be well, even in India, to state what is really implied in this The Government of India could still retain an authority which is admitted on all sides to be real and effective over the two Lieutenant-Governorships just named, one including 30 millions and the other 14 millions of people It would still govern directly through Chief Commissioners, who are only deputies of the Governor General, Oude with a population of 8 millions the Central Provinces with 7½ millions, and British Burma with rather more than 2 millions Over the population of the Native States, amounting to nobody knows how many millions, the Governor General in Council would still exercise so much authority at all events as consists in preventing or punishing any conspicuous and flagrant wrong He would further still retain by law the power of "superintending and controlling" the Governors of Madras, Bombay and Bengal proper, who rule together 70 millions of men "in all points relating to the civil or military administration" of their provinces, and of compelling those functionaries to obey "his orders and instructions in all cases whatsoever" (3 & 4 Wm. IV, c 85, sec 65) More than all, the great centralized department of Finance would be in his hands, implying among other things an effective control of public works throughout the whole of India. When to these duties is added the supervision of a vast European and Native Army, and the conduct of the exter-

nal and internal diplomacy of India, the Governor General in Council must surely be admitted to be at the head of one of the most colossal governments of the world, even though the Local Government of Bengal should be allowed a greater degree of independence than is permitted to it at present Indeed, this enumeration of duties does not state the whole truth Is it not the fact that India is daily becoming more difficult to govern, more submissive certainly as regards physical resistance, but more exacting in its demands for good, precise and politic government? It seems to me a man must be very unobservant who does not perceive that a time is near at hand when either the duties of the Government of India must be ill discharged, or their sphere must be contracted The present opportunity seems to me an excellent one for making timely provision against an inevitable future, by conceding comparative independence to a province which, after all, from the very necessity of the case, is even now pretty much left to itself

The Secretary of State intimates to us that it is scarcely possible to keep the question of the constitution of the Bengal Government apart from the question of the seat of the Government of India. I myself do not see that there is any insuperable objection to the permanent or prolonged presence of the Government of India in the territories of a Local Government which takes the form of a Governorship in Council, and I rather infer from Sir H Durand's proposals that he is of the same opinion Let us assume, however, that the higher dignity accorded to the Government of Bengal will render it more convenient that the Governor General in Council should be absent from Calcutta during at least part of the year, and that we are thus driven to discuss the evils or advantages of this absence I have to ask whether it is really true that the system inaugurated by Sir John Lawrence of periodical migrations between Calcutta and Simla has failed Is there the least ground for questioning Mr Grey's opinion that it has added very greatly to the efficiency and dispatch of official work? Has it not, at the very least, so far succeeded, that it may fairly be taken as the point of departure for further arrangements? These questions appear to me likely to be slurred over, through the natural hesitation which most of us feel in contending that what has been to some of us a personal benefit has also been a public advantage

It must be borne in mind that every argument against Simla as an alternative capital has to be maintained in the teeth of the fact that for much of the last five-and-thirty years it has actually been the alternative capital, if capital be taken to mean the seat of the actual Government Further, the actual Government of the country tended more and more to fix itself there It is no mere conjecture when I assert that, if Lord Elgin had lived, he would never have come near Calcutta again He had already spent one summer in Simla, and, of the three which appeared to

remain to him, he intended to spend two at Simla, and one at some other hill station. The Commander-in-Chief had for some time lived at Simla almost exclusively. The truth is, the theory that Calcutta was the capital was preserved only by a fiction, and a fiction so transparent, that, did I not know something of the power of fictions, I should wonder at men being blinded by it. The Governor General's Council remained there under a President, invested nominally with the full powers of Governor General in Council. In point of fact, however, a division of business was made between the Governor General in the Upper Provinces and the President in Council at Calcutta on the principle of leaving to the latter all business which was of a simple, routine, or common-place character. Everything which was of importance went directly to the Governor General, and there was either a rule or an understanding that, if any matter which came before the President in Council assumed the least importance, it should be sent on to the Governor General.

The drawbacks on the position of Simla which Sir H. Durand has stated with undeniable force existed in former days with many others which have since disappeared. Yet they did not, in point of fact, prevent the gradual approach of Simla to the status of a capital, and they have not been hitherto assigned, at least not generally, as fatal objections to the resort of Governors General to the hills. Great evils are no doubt alleged to have resulted from the stay of the Governors General at Simla, but I have always heard these attributed to another incident of that stay, the severance of the head of the Government from his official and responsible advisers, the very incident to which the present Viceroy has applied a remedy. Moreover, it is to be remarked that Sir H. Durand urges against Simla the precise drawbacks which are in course of removal. The railway will be very shortly open to Umballa, before very long it will be completed between Umballa and Amritsar, and it is settled that it will be prolonged to Attock or Peshawur. When these lines are somewhat further advanced, and when improvements now in progress on the hill road are finished, it appears to me that Simla will be fully entitled to the benefit of the argument which is usually employed in favour of Calcutta, as against Bombay and Poona, that modern facilities of communication have rendered the precise situation of the capital unimportant.

Sir H. Durand has further objected that, through the migrations between Calcutta and Simla, two months of the year are lost. The time is greatly too long according to my experience, and I should hardly describe the days consumed in travelling as necessarily lost to official labour, but no doubt the experience of Members of Council concerned with other departments may give a different result. I venture, however, with all deference to my honourable and gallant colleague, to express an opinion that the argument involves a fallacy—the fallacy implied in testing an

existing, by comparison with a non-existent, system The two months supposed to be lost could only have been saved by a Government which remained the whole year in one place But where is there such a Government in India? The larger number of the Local Governments in India move undisguisedly every year to the hills, with all or nearly all their Secretariats, and the fact is the more remarkable, because these Governments are not, like the Government of India, charged simply with the functions of superintendence and control, but stand in direct contact and relation with the people More than this every government and every administrative functionary in the country is perpetually in movement during the cold weather or the rains, yet nobody ever thought of describing the time spent in locomotion as lost Nor is this all The system of the present Governor General can only be fairly judged by comparing it with that which it superseded,—that is, with a system under which the Governor General separated from his Council for four years together, travelled at large during the winter and spent the rest of the year at Simla I am happy to find myself in entire agreement with Sir H Durand in my estimate of this exploded system, under which important papers sometimes went three times over 1,500 miles, between the Governor General in the Upper Provinces and the Council at Calcutta I myself, judging from the experience of a single twelvemonth, believe it to be impossible for any human arrangement to have worked more perversely

The Government of India is now abreast of its work When the present system began, it was heavily in arrear, and, I believe, there are no traces of a period at which it was not in arrear, although the work was infinitely less than it is now The improvement is no doubt partly owing to a cause on the efficiency of which Sir H Durand and I are agreed—the presence during four years of the Governor General with a Council which now practically consists of heads of departments But I am sure it is also due to another influence—the influence of a fairly good climate on the quality and speed of our work

Discomfort and disease have so long been the conditions of official life in India, and so much admirable work has been done under those conditions, that there is, I venture to think, a disposition in some minds to regard them as indissolubly associated with the good government of the country Yet surely, in settling the question of the capital, it is unreasonable to leave out of account the discovery made thirty or forty years ago, that nature has been less unkind to us than had been supposed, and that within the geographical limits of India there are climates in which the English race retains or regains its native vigour I quite understand the necessity of guarding against the temptation to overrate the value of these climates, and to underrate the difficulty of utilizing them Yet there may be prejudices of the opposite kind, and the censors of resort

to the hill climates should be sure that unconsciously they are not arguing as a conservative of the Spanish Indies may have argued against the use of the Jesuits' bark in fever, as a practice in itself effeminate, and calculated to excite ill-feeling in those who could not afford to purchase the new drug.

Everything is to be preferred to miscarriages of policy and administration, and, if the interest and safety of the British Indian Empire do not permit its government to be conducted in a good climate, it must be conducted in a bad one Yet the necessity is not the less a great public misfortune It is most unfortunate, for example, that the area from which Governors General and Governors are taken should be narrowed If there is one thing more certain than another, it is that the English Parliament, as it grows more popular, will be more and more inclined to govern its great dependency directly through functionaries known to itself and sent from home, and every chance thrown away of mitigating the perhaps unreasonable fear of the Indian climate which prevails in England is a chance the less for the good government of this country Again, the necessity of which I have spoken is unfortunate, because, though men bred in India may work well in extraordinarily bad climates, nevertheless they have thus much in common with men bred in England that they work better in better climates—more efficiently, because either more vigorously or more calmly There is no economy which a Government can practise like the economy of its servants' health and nerve, it may be compelled to expend them on mere resistance to unfavourable physical conditions, but, if it goes an inch beyond absolutely necessary expenditure, it is guilty of the most foolish form of prodigality

Some very painful statistics of death and disease in the High Court during the last five years, which I read the other day in a Minute of Mr Justice Seton-Karr, are fatal, I am sorry to say, to Sir H Durand's impression that the Court furnishes any evidence of the healthiness of Calcutta. I am, however, disposed to agree with him that on grounds of salubrity alone it would be hardly worth while changing the seat of the Government to any other place in the plains of India My objection to Calcutta is precisely that of which I admit the force when urged against Simla Neither Calcutta nor Simla has any claim to be considered a capital in the sense in which the word has generally been understood One would suppose that the natives of a country to be governed from a capital would approach it with tolerable readiness, would take their fashions of life and thought to some extent from it, would be represented in the society which inhabits it, and would reflect the civilization of which it is the exemplar These tests of a capital are satisfied by Calcutta so far as regards Bengal proper, but, so far as respects the rest of India, Calcutta is remarkable for not satisfying a single one among them Not even the most powerful of Indian motives, a grievance to

be redressed, will in most cases bring a native of India, other than a Bengali, to the dreaded city Simla is certainly not much more resorted to, but this is rather the fruit of ignorance than of fear, and Simla has, beyond doubt, the advantage of Calcutta in the number of experienced functionaries from all parts of India who come to it I myself have seen more there in one month than at Calcutta in six, and this is only the natural result of the difference between a place to which everybody will come if he can, and a place to which nobody will come if he can help But neither city seems to me to be a capital, unless a capital be merely the spot at which the Government may be for the time being

It would be unreasonable that, after all I have said, I did not state affirmatively my own views of the best arrangements which could be adopted I take the liberty of calling attention to an experiment which Lord Elgin was on the point of trying when he was overtaken by death A standing camp had been established in the neighbourhood of Lahore, and there Lord Elgin intended to assemble both the Executive and Legislative Councils I venture to suggest that, at the beginning of the cold season, such a camp should be established near each of the great native cities in turn, that the Supreme Government, descending from the hills somewhat sooner than at present, should be received in it, and should then proceed with such legislation as would more especially affect native interests, reserving for Calcutta or Bombay, which would be visited afterwards, the discussion of the budget and of such provisions of the Codes as are intended for general application Natives of India in any number would resort at that season to Lahore, Agra, Delhi, Lucknow, or Benares, and there could be no better opportunity for holding those congresses of Governors, Lieutenant-Governors and Chief Commissioners, which have been recommended by high authority as the best preservative against that interprovincial friction which has become so annoying of late years The Supreme Government of India would thus become peripatetic If it be objected that there is no example of such a Government, I answer first that the fact is not so, since almost all Governments originating in the conquest of hot countries by persons born in a cooler climate have been, as a matter of history, more or less peripatetic, and that, even if the objection were well founded, the British Empire in India is too novel and extraordinary an experiment to be dependent on any precedents, except those which its own experience furnishes I would ask whether such a system as I have described would, in truth, be more than the old progresses of the Governor General, cured of one particular vice, and adapted to the circumstances and condition of the India of the present day The cost of time and money entailed by these movements might, in my judgment, be reduced within narrow limits by organization and forethought Much of the public

and private expense—the first anything but large—and much of the loss of time entailed by the system of the last four years, have been attributable to its provisional character

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No 71

Application of Enactments to Foreign Territory.

(23rd April, 1868.)

Proceedings, Foreign Department, Judicial, A, May, 1868, Nos 1 2.

THE position of things appears to be this

Article 84 of the Native Articles of War sanctioned by Act XXIX of 1861 is intended to bring persons resident in the cantonment, other than officers, soldiers and European British subjects, under a sort of semi-military law contained in the cantonment rules

When this article is applied to a cantonment in British territory, it is binding on all residents (other than the excepted classes) whatever their nationality.

The Commissioner, however, argues (and probably correctly) that, if the Legislative Council had attempted to apply this article to cantonments beyond British India by force of its legislative authority, it would only affect "servants of Government"—the only class for whom at that time the Council could legislate beyond British India

But the question now is whether the article should be applied by the authority of the Maharaja of Mysore, now vested in the Government of India. If it be so applied, it will affect all residents (save those especially excepted) whether they be British subjects or subjects of Mysore or of Travancore or of any other State The fact of residence will bring them under the article

But to this application of the article by the Maharaja's authority I understand Mr Bowring to object I do not exactly understand the ground of his objection I imagine (but if the fact is not known at the Foreign Office, enquiry should be made about it) that there are several cantonments beyond British India of which the full sovereignty has not been ceded, in which the article is in force with the express or implied consent of the Native Chief If so, there would seem to be still stronger reason for introducing it into a place of which the prince is for the moment identified with the Governor General in Council

I suggest that the above view be placed before Mr Bowring, and he be asked the precise ground of his objection to the introduction of the article, which *primâ facie* affords wholesome provision for the good order of the cantonment If his objections continue, he should be requested to state what course he would recommend

It will of course be understood that the Legislative Council had full power to apply the other articles of war to officers and soldiers while they are "servants of Government" We could also strike the exception from the 84th article of European British subjects if we pleased, since power to legislate for that class when in Native States has since been conferred on us

(See Nos 21, 39 and 91)

No 72

TRIBUTARY MEHALS OF ORISSA, SOVEREIGNTY

(26th May, 1868)

Proceedings Foreign Department Political A, July, 1868, Nos 217 243

THIS case illustrates in a curious way the difficulty of applying modern ideas and principles in India

There is no doubt on the one hand that the engagements entered into with the chiefs of the Tributary Mehals, together with some of the subsequent proceedings of the British Government, are inconsistent with any view of the position of those chiefs except one which makes them *feudatories* of this Government (if the language of the Middle Ages is to be employed), or, if we are to use the phraseology of modern international law, rulers to whom a small portion or fragment of *sovereignty* is reserved, sufficient to enable them to exercise some of the functions of Government

On the other hand, there is not a little which bears out the view of the Lieutenant-Governor that these estates are mere zemindaries Nothing is more inconsistent with their standing in a purely political relation to the Government than their having been made the subject of legislation Yet they have been legislated for in 1816, and, though in the Regulation of 1805 passed soon after the Tributary Mehals accrued to the British Government, they are excepted from its operation, the language of the Regulation leaves on my mind the impression that its framers entertained no doubt of their power to legislate for the Mehals, and merely abstained from doing so on grounds of expediency This indeed seems to have been Mr Mill's opinion, if it is to be collected from his expressions on the subject of the exemption of the Tributary Mehals from the jurisdiction of the Courts It is curious too that when, so late as 1839, a correspondence took place as to some new rules to be laid down for the internal control of these estates, it took place in the *Legislative* Department

Few things, again, according to modern ideas, are more inconsistent with political relation than the subordination to the Sudder Court effected by the Regulation of 1813 The truth is

the acts of our predecessors in entering into these engagements with the chiefs of the Tributary Mehals, in legislating for their territories, and in placing them under the Sudder Court, were not consistent with one another, and unfortunately it is only by the interpretation of those acts that the abstract question can be settled The explanation no doubt lies in the indistinctness, forty or fifty years ago, of lines of demarcation which are now being more and more recognized in India. To the framers of the Regulations of 1805 and 1816, who themselves possessed both executive and legislative power, it probably never occurred to make nice distinctions between the modes of exercising those powers Nor, again, at a date not far removed from the time when the Governor General and his Council were a Court of Justice, were the limits of executive and judicial authority likely to be very plainly marked The Sudder Court, as has been brought out strongly by recent discussions, was to the last an administrative, as well as as a judicial, body, and the anomaly, such as it is, attached to the High Court

There are several influences at work which force us from time to time to adjust Indian arrangements to modern principles But I do not see much use in unnecessarily hastening the process We can at any moment place these Mehals in wholly political relation to the Bengal Government, by repealing the Regulation of 1816 and by declaring the feudal position of the chiefs—a declaration which the Executive Government is always competent to make. But the question seems to me to be entirely one of expediency No doubt the qualified jurisdiction of the High Court might possibly cause inconvenience, since it might adjudge the succession to a person whom the Government might not think it expedient to make a ruler of But I suppose that in 99 cases out of 100 the successor whom the Government would itself select, and who would be most popular with the people, would be the lawful heir according to Hindu law and the usage of the family Now, the practical effect of the Court's jurisdiction strikes me as being that the Government gets the best possible legal opinion on questions of successions, which are likely to be difficult. If the Tributary Mehals are transferred to the Political Department, these questions will be debated between the Bengal and Supreme Governments Now, the Bengal Government has little political experience and is peculiarly ill provided with the means of procuring good legal advice apart from that obtained from the High Court It might consult the Advocate General, but on points like those adverted to his opinion would possess no special value

The Foreign Department of this Government is no doubt somewhat differently situated But I must say for myself that, on the comparatively few occasions on which I have been asked for an opinion on questions of native succession, I have found the duty a very unsatisfactory one to discharge.

should be a promise to pay to one or all (as might be thought most expedient) of the temple managers by name Fresh notes should be given out as changes in the management occur

Though this course will be perhaps sailing rather near the wind, I do not think it can fairly be said to violate the prohibition contained in section 22 of Act XI of 1863 against officials undertaking the superintendence of temple property

(*See Nos 10, 62, 80 and 87*)

No 74

CASHMERE, SUCCESSION OF COLLATERALS

(*18th July, 1868*)

Proceedings, Foreign Department, Political, August, 1868, Nos 98A 98F

IT certainly seems to me a very serious thing to promise the succession to *un*-adopted collaterals In the present case no evil seems likely to result, but if it becomes a precedent a novelty will be introduced of which it is impossible to foresee the consequences I presume the oldest collateral (or will it be the *newest?*) will claim as of right

(*See No 77*)

No 75.

UNIVERSITIES, PUNJAB UNIVERSITY

(*29th July, 1868*)

Proceedings, Home Department, Education, 19th September, 1868, Nos 191-99B

I HAVE kept these papers some little time, because, as the proposal which they convey is avowedly founded on condemnation of the University of Calcutta, of which I was for four years Vice-Chancellor, I wished to be sure that I was not viewing it in the light of my natural prejudices I will say at the outset that some of the remarks of the Punjab Educational Officers on the existing course of the Calcutta University seem to me to deserve the consideration of Government on their own merits Much of their criticism appears to me extremely captious, but, while I think that the defects which they pretend to point out are for the most part purely imaginary, I have never been blind to the indirect tendency of the mode of examination prescribed by the University, its tendency to prevent the acquisition of a certain amount of knowledge (it will be at best a very moderate amount) by students who cannot master a western language It may be

worth the while of the Government of India to consider whether (so far only as concerns the more backward provinces of the Bengal Presidency), such as the Punjab and parts of the North-West) some importance ought not to be attached to the suggestion that candidates for the Entrance Examination should have the option of being examined in their vernacular, and that the same option should be extended to candidates for the First Examination in Arts, so soon as proper evidence can be produced that satisfactory vernacular text-books are available I must admit that this time is, in my judgment, far enough away, when I read the list of subjects prescribed for that examination I have no right to speak with confidence of oriental languages, but I venture to think that those who believe they can easily be made the instruments of conveying knowledge (by which I mean positive and not literary knowledge), have scarcely paid sufficient attention to the long and laborious process by which even the western languages have been so fashioned as to admit of their becoming vehicles of accurate thought Still it is possible that something can be done, and the possibility may deservedly be weighed by the Government of India It is true that the law does not give the Government a direct control over the University But I feel absolutely sure that the Syndicate and Senate, although the former body has apparently declined to modify its system in the particulars above referred to for the whole Presidency, would receive with all possible deference a suggestion of the Government for its modification in respect of the less advanced provinces

There have, again, been universities where the teaching was of the first order, but where the function of examination was either not exercised at all or very inefficiently Such were the Scottish Universities forty or fifty years ago, some among which actually sold their degrees, even their medical degrees, for money If, however, Mr Aitchison and those who agree with him mean that the teaching function and the testing function improve one another when they are blended, I can only say that my experience and observation point in precisely the opposite direction Teaching institutions succeed, because they are served by efficient teachers, and the name by which they are called is absolutely immaterial But, on the other hand, the process of examination or testing results is distinctly injured by identifying the teaching and examining bodies I venture to say that in the German and Scottish Universities the testing process is even now very far from being on a level with the teaching In the English Universities, examination is almost wholly disjoined from teaching, the universities almost exclusively undertaking the first, so far as concerns degrees, the colleges conducting the practical education of the student While the success of the colleges at Oxford and Cambridge is of course matter of opinion, it is by the Universities of Oxford and Cambridge that examination has been developed into what may almost be called a scientific process, yet one small blot on the system cannot be denied—the shade of suspicion, which occasionally rests on an examiner, if not necessarily examining his own pupils, yet sometimes testing the knowledge of students trained on a system to which he is known to be wedded The most satisfactory examining body I know is the University of London, which has performed the difficult feat of inspiring a number of teaching institutions, separated by differences of religious creed, with the most perfect confidence in its impartiality, as well as its thoroughness I say nothing of the University of France, since, though it is a purely examining institution and has the highest reputation, I do not profess to be sufficiently acquainted with it

I have insisted on the distinction between teaching bodies and examining bodies as being the only one which has any reality, because it certainly appears to me that a plan for a university at Lahore amounts to a proposal that the Punjab Educational Department shall be allowed to test its own results, instead of having them tested by an external body much larger than itself Doubtless there are some of the results aimed at by the Punjab authorities to which the Calcutta University applies no tests whatever, because it does not consider them of any value, but still, on the whole, the ultimate aim of teaching in the Punjab must be much the same as in Lower Bengal, and by this project the Punjab Government seems to me to propose that its own teachers shall test the degree of their own success This is surely very objectionable Even in Calcutta we feel the diffi-

culty created by the comparative smallness of the educated class outside the teaching body, and are too often driven to take our examiners from among educational functionaries who, though they may not exactly be set to examine their own pupils in the very subjects in which they have instructed those pupils, have nevertheless necessarily formed opinions about them in their own lecture-rooms This difficulty will be much greater in the Punjab The advanced students are not numerous The teaching body is but small, and I think it may be said without offence that, so far as the higher education is concerned, it has not been conspicuously successful, perhaps not wholly through its own fault From this body the gentlemen who will confer the degrees of the Lahore University will have to be selected for a long time to come, for though assistance may occasionally be procurable from outside, functionaries in the Lower Provinces are too busy to be spared for Lahore, and I fear that, if their reports were unfavourable, they would not be summoned inconveniently often Nor is it the only drawback on the project that the educational officials in the Punjab would become judges in their own cause The judgment pronounced would be ostensibly the same as the judgment pronounced by the Bengal examiners on the Bengal students A B A or LL B of Lahore would rank with a B A or LL B of Calcutta Now, a Bengali Bachelor of Arts or Laws may be a young man who has an unpleasantly good opinion of himself, but he has really proved that he possesses a considerable amount of genuine knowledge These degrees are coming to be more and more recognized by the Government, the High Courts and employers of various kinds as guarantees of ability, and, indeed, if they did not possess an ascertainable value, few natives would submit to the laborious preparation required for them But now a new university is to be established in the Bengal Presidency with the power of conferring degrees colourably the same, apparently even LL B degrees which admit to the pleaderships of the High Courts without examination, and medical degrees which carry with them a license to practise Already some inconvenience is experienced through the competition of Madras and Bombay degrees, but those universities are at a great distance, and they are founded on the same general principles as the Calcutta University But the Lahore University avowedly repudiates those principles or many of them I agree with Sir H. Durand that it is not easy to frame a clear notion of all its objects, but it is at all events admitted that some of them are not educational but political In some way or other, though I am not altogether able to say in what way, the Punjab nobles are to be conciliated by the quality of the knowledge diffused, or by the methods of imparting it Even, however, if I could be sure that the knowledge tested were of the same description as that tested by the University of Calcutta, I cannot, for rea-

sons above stated, feel any confidence in the sufficiency of the tests I venture, therefore, to express a hope that if this university be established, it will be compelled to give some new name to its grades, and will not be allowed to put into circulation coin which I will not call base, but which for some time to come will be heavily alloyed, stamped with the same mint mark as that issued by the Calcutta University

If there is anything in the argument that the effect of establishing the Lahore University will be to take away from the efficiency of examination, it deserves the more serious consideration, because the subsidy of the Government is expressly asked on the grant-in-aid principle , and, if I am right, the very condition of a grant-in-aid—a stringent system of testing results—will be wanting As to the results themselves, I have said before that I have failed to gather from the papers what the expectations of the Punjab Government are In the first place, the Punjab Government does not appear to me to distinguish clearly between the results, no doubt considerable, which might be obtained by improved teaching in the Punjab colleges, and the results, very scanty at most, which might be looked for from a change in the form of the examination papers Next, the Punjab authorities seem to have a generally misty conception of what they want and of what they intend to aim at. One thing which, as it seems, may be hoped for, is the improvement of the Punjab vernaculars, that is, Punjabi and Pushtoo Now, undoubtedly direct efforts have before been made to bring about the so-called improvement of old, exuberant and cultivat ed languages, but this has been managed by forbidding the use of all words except those sanctioned by the best writers Rude languages, so far as I know, can only be improved by the growth of ideas among the people who speak them, or (as in the case of Bengali) by contact with other languages which have long been used as media of thought. The proposal to found professorships for the improvement of rude languages, or at all events to make that improvement a subject of direct study and teaching, seems to me a very extraordinary one and likely to lead to very singular results I should say that the production of a dialect like the "Pigeon English" of Hongkong and Canton is a not improbable fruit of the experiment Again, in what is the cultivation of oriental literature by the Lahore University to be different from, or superior to, the cultivation of the same literature by the colleges in Calcutta and its vicinity? First among the objects of the new institution is placed "encouragement to the enlightened study of oriental languages and literature" What is the meaning of "enlightened?" The only meaning I can attach to it, and I presume the meaning which the Government of India was intended to attach to it, is that the principles of Western philology and criticism are to be applied to Eastern language and literature But, if this be so,

the object is the last which would call forth the enthusiasm of the Punjab Chiefs, or rather of the classes from whom they take their opinions Can anybody doubt for a moment that a Pundit learned in the native fashion would (if he knew anything about them) regard the labours of the great Calcutta Sanskrit scholar who has made native erudition famous in Europe as being not simply worthless but sacrilegious? Can anything be fancied more offensive to a devout Mahomedan, possibly with a latent leaning towards the Akhoond of Swat, than a really critical sifting of his sacred books? The fact is the application of modern critical and philological principles to languages in which a sacred literature is embodied is essentially a rationalizing and destructive process, and so it has manifestly proved in Lower Bengal The difference in the point of view between the Punjab Government and the subscribers to the university is brought out with almost ridiculous clearness in the correspondence with the Maharaja of Cashmere The Maharaja subscribes (and indeed thanks God that he is allowed to subscribe) "one lakh Srinagri rupees" to a university which has for its object the propagation of the vernacular literature and sciences, in other words, of the science which places the world on a tortoise and of the literature which (whatever be its intrinsic poetical value) is taught according to methods which I do not think it presumptuous to describe as a multiplication a thousand-fold of the worst educational follies from which we are escaping in England But the Punjab Government in thanking the Maharaja accepts his donation for the "propagation of literature and science through the Indian tongues" It is difficult to conceive objects more different than those for which the money was given and those for which it was received The fact is, the Lahore University, considered as a teaching institution, must either become a laboratory for the production of Moulvies and Pundits, or else, from its freer use of vernacular instruction, it will ultimately shock native prejudices far more acutely than the institutions in Bengal of which the teaching is in English

I am very sorry to say anything in apparent disparagement of those native sympathies which are alleged as a reason for consenting to the Punjab scheme But, I must say, I think we ought to be on our guard against alleged bursts of native enthusiasm in the Punjab Even in my time in India I have witnessed several such bursts, as, for example, in favour of giving a testimonial to Colonel Elphinstone for his services in the cause of female education We ought to know what solicitation there has been, official or non-official, direct and indirect, and what representations have been held out to the subscribers There are many reasons at the present time why several classes in the Punjab should be willing to contribute freely towards any object which functionaries appear to have at heart, and the liberality of the Maharaja of Cashmere is per-

fectly intelligible quite apart from his misconception of the object for which he subscribed.

So far as the Punjab Educational Department complains of certain peculiarities of the Calcutta course I think its representations deserve attention For the rest, it seems to me that this scheme, instead of coming before us in so extremely magnificent a form should have been submitted in the more modest guise of a proposal to improve the machinery for the higher teaching in the Punjab colleges. In this view the suggestion of the Delhi College functionaries that the subscribed money should be divided between the Delhi and Lahore colleges and devoted to the above purpose appears to show great good sense.

No 76

Execution of Decrees in Native States.

(1st August, 1868)

Proceedings, Foreign Department, Judicial, A, August, 1868, Nos 22-23

This is rather a political than a legal question. The principles which govern the execution of foreign decrees in civilized States are correctly, though rather broadly, set forth in the Circular of April, 1867 It must be remembered, moreover, that, like almost all rules of what is called the "comity of nations," or in other words private international law, the rule of reciprocal enforcement has been incidentally and locally subject to restriction The character of this restriction has been pointed out by Mr Justice Boulnois of the Punjab Chief Court, though I think he overrates the practical importance in this day of the hesitation in some countries to accept foreign decrees as conclusive. As a matter of fact, the tendency of opinion among European lawyers is strongly towards the most liberal interpretation of the rule and even where the doctrine of the country is that a foreign decree is only *primâ facie* evidence of the claim, hardly any evidence is practically permitted to rebut it.

Although there seems to be singular lack of information as to the Native States in which reasonably-organized Courts exist, yet where they exist, no difficulty, so far as I can see, arises The proper answer to give in such a case to an applicant from British India is to try the Courts.

Where, however, the Courts have no true organization or are only the instruments of a despotic sovereign's will, a class of difficulties arises on which it would be presumptuous in me to offer a confident opinion I cannot, however, help saying that the position of a British Indian creditor whose debtor withdraws into a State of this kind appears to me one of great, and indeed of unexampled, hardship. I believe it is allowed that

the trading classes largely have their homes in Native States and come thence into British India for purposes of business The foreign trader remains in British territory so long as he is ready to pay money, but the moment it becomes inconvenient to him to pay his debts he crosses the border As an English Court would in such cases have jurisdiction, a decree is obtained which, I may observe, is made though *ex parte*, not without enquiry, and on these but justice cannot be done

Now, I have no hesitation in asserting that, if these Native States were absolutely independent and were as settled as they are, the British Government would insist on their compelling the defaulting debtor to pay Indeed, it is much to be wished that the cases in which European Governments now-a-days put forth their force to compel satisfaction to be given to subjects of their own who are creditors, were cases of as clear justice as the case now before the Government of India

The practical result therefore, is that, because these States are not independent, and because they are more or less under the authority of the British Government, the British creditor gets less justice than he would if they were not under our rule

Such a scandalous anomaly as this ought to weigh something against the ultra political arguments advanced in the Under-Secretary's note We owe something doubtless to the susceptibilities of native Chiefs, but surely we owe something also to creditors who are our subjects, as against those who, by the assumption, have abused the privilege of residing temporarily under British protection

I myself without speaking confidently on such a point, incline toward the Oude suggestion that there should be a separate engagement with each chief—if not a treaty, at least an understanding

Is there really any objection to the Political Officer pointing out to each chief the unjust advantages which refugee debtors in his territories enjoy, and putting it to him what mode of testing the foreign decree would recommend itself to him?

No 77

Cashmere, Succession of Collaterals

(4th August, 1868)

Proceedings, Foreign Department, Political, August, 1868, No 103

While I think that the opinion of His Excellency the Viceroy as to the services of the Cashmere House ought to be regarded as conclusive, and while I consider it most expedient to take some step which may reassure the present Maharaja after the persistent attacks made on

his Government, I feel myself compelled to agree on the question of principle with Sir H Durand I cannot doubt that this concession, if made, will almost immediately become known to the other native Chiefs of India, and will be made the foundation of universal demands for similar indulgence. If it be true that the minutest distinction accorded at a Viceregal Durbar makes its way to every Court in India and is cited as a precedent or a grievance on the next available occasion, how can we possibly suppose that the establishment of a new principle of succession in a Hindu House will be regarded as exceptional and as affecting that House alone? The Cashmere dynasty rules a wealthy and powerful State, but the claim to consideration appears among native Chiefs to rest not more on extent of dominion than on antiquity and splendour of family descent. How can we deny to families whose antiquity inspires an almost religious reverence that which we concede to a dynasty whose origin is extremely modern, and viewed, I believe, with anything but respect?

The existing system of succession among quasi-sovereign Hindu princes in India has the advantage of extreme simplicity The right of adoption in default of heirs of the body—now firmly secured to them—amounts to a power vested in the reigning chief of selecting a successor from among his collaterals To take a very famous illustration, it is the rule of succession which practically obtained in the early Roman Empire, though in that case the power of selection could be exercised not only by adoption but by will. If we once depart from this simple principle, I own that, from a purely legal point of view, I cannot look forward without dismay to the sea of doubt on which we shall be launched What is the rule of succession to a Hindu sovereignty among unselected collaterals? The answer is that nobody knows Not only does the general Hindu Law of Succession to private property give us little help in solving the question, but it rather confounds our ideas, because (putting aside some unimportant exceptions) it is essentially a system of class-succession excluding primogeniture In successions to a Hindu sovereignty does the collateral who is nearer to the founder of the House exclude the collateral who is nearer to the last reigning chief? Does a nearer collateral connected through females only exclude a more remote collateral connected through males? A man may of course have an opinion on these two points founded on supposed analogies in Hindu or even in English law, but in truth nobody can give a reply with confidence or certainty It happens, however, that out of the two questions above suggested grew the largest and bloodiest wars, or rather series of wars, in which the English monarchy has been involved The fact is that nothing is more arbitrary in itself, and nothing has been more gradually settled, than the system of collateral succession to European sovereign-

ties, and it is no slight thing to propound the same set of problems for decision in India

I am informed that in Oude, where the property of certain families claiming a "guddee," and probably older than most of the reigning Houses of India, descends indivisibly, there is no pretence whatever of the existence of any general rule of collateral succession applicable to such a case, but each family professes to have a complete set of provable family usages governing its own successions It is extremely improbable that the reigning Hindu Houses can produce proof of any such customs, partly because of the virtual universality of the system of adoption, partly on account of the recent accession of several of them to sovereign power and their previous obscurity

It may be said that the British Government will decide between the conflicting claims of collaterals But, unless it be distinctly stated that no collateral is to succeed as of right, the promise to allow collateral succession will be regarded as a promise to respect the right of collaterals to succeed, and each collateral will be practically invited to make preparations for pressing his due claims I venture to assert, too, that, in ninety-nine cases out of a hundred, the future British Government of India, having no reason *à priori* for preferring one collateral to another, will select the one whom it supposes to be legally entitled to succeed, and the question of legal right will be raised after all But, if any other candidate seems to a portion of the people to have a better claim than the nominee of the British Government, what security have we against an outbreak of partizanship similar to that which, in spite of all the influence of the British power, has just plunged a miserable little Cuttack State in war?

One very unfortunate result of diminishing the inducement to Hindu Princes to adopt will be that minorities will obviously become much rarer An adopted successor is almost invariably a child, a collateral successor will almost invariably be a grown man It seems to be generally admitted that there is no happier episode in the modern history of Native States than the minority of the chief The British Government, temporarily assuming the administration in a tutelary capacity, secures for the young prince the best education available and for the people the best possible combination of Native and British institutions, without exposing itself to the suspicion of intended annexation, and without placing itself under the temptation to go too far in anglicising the country Nobody denies that the best-governed Native States owe their superiority to a minority wisely dealt with

I cannot help believing that the just claims of the Maharaja of Cashmere might be met in a simpler manner Advantage might be taken of the policy so conspicuously inaugurated in Mysore His attention might be directed to what has taken

No 79.

RAMPORI CESSION CASE.

(11th August, 1868)

Proceedings, Foreign Department, Political August 1868, No 321

RATHER more than a year ago, an opinion given by the Advocate General to a private client attracted the attention of Government. Mr Cowie had apparently been consulted on the question whether a particular District Court in British India retained jurisdiction over certain lands comprised in territory which the Governor General in Council, on behalf of the Queen, had transferred, or affected to transfer, by sunnud to the Nawab of Rampore, to be held by him in the same way in every respect in which his patrimonial dominions are holden. Mr Cowie advised that the effect of the transfer by sunnud was merely to assign the revenues of the territory comprised in the sunnud to the Nawab, who thus became in respect of that territory a jagheerdar in British India, and it followed that the constitution of the jagheer in no respect impaired the jurisdiction of the British Court The sunnud purported unquestionably not to create a jagheer but to transfer territory in sovereignty, there had, however, been irregularities in the transaction, which had been animadverted upon by the Secretary of State, and hence it was at first supposed that the Advocate General considered some of these irregularities to have been so formidable as to prevent the declared intention of Government from taking effect He was, however, requested to state the grounds of his opinion, for the information of the Governor General in Council

The reply of Mr Cowie has been received, and it proves to be of a much more serious nature than had been expected He waives all consideration of accidental irregularity, and he is satisfied to regard the sunnud as if it had emanated directly from the Crown He affirms that, even if it had so emanated and had clearly indicated an intention on the part of the Crown to transfer sovereign rights, it nevertheless could not have effected more than a transfer of the Government revenue The Officiating Secretary, the Under-Secretary, and the Assistant Secretary have pointed out the extremely grave consequences of this doctrine. Many, if not most, of the rewards of loyalty conferred since the mutinies on native Chiefs have consisted in gifts of territory made through the instrumentality of sunnuds The portions of territory so transferred have been treated by the chiefs as an accession to their own dominions They would assuredly regard with extreme disgust an announcement, that they had merely been constituted donees of the revenue, and it

if not for aggression. The argument of Sir Barnes Peacock which I have cited appears to meet Mr Cowie's objections to the creation of new tribunals and the introduction of new laws in the ceded territory, otherwise than by Parliamentary legislation If we have the implied sanction of Parliament to the acquisition of territory, whereby the sphere of Indian legislation is enlarged and the power obtained of establishing new tribunals and introducing new laws, it seems to follow that we can go through the converse operation and by cession of territory obliterate the Court and law which are the creation of Indian legislative authority.

As, however, I said before, I incline to the belief that the Advocate General does not intend to deny the power of the Crown to transfer portions of Indian territory in sovereignty or semi-sovereignty, but only to deny the power of effecting the transfer by sunnud I understand him to maintain that a treaty is indispensably necessary for an effectual alienation, and that a sunnud is as inappropriate as would be, in European international transactions, an English conveyance with its multiplied reference to feudal rules and to the Statute of Uses Now, a sunnud is undoubtedly the instrument by which the Indian Government ordinarily grants land or revenue to one of its subject and I quite admit that in a case where the intention to alienate sovereignty or to dispose of revenue was doubtful Mr Cowie's reasoning might be entitled to weight The sunnud, however, which is before us clearly recites an intention to confer the same rights in the transferred territory which the Nawab enjoys over his inherited dominions, and hence Mr Cowie must be assumed to make everything turn on the employment of a sunnud instead of a treaty It must be recollected, however, that in international law, and in the *quasi*-international law applicable to India, facts are everything, and the fact seems to be established by the Secretary's notes that sunnuds have been about as frequently employed as treaties in adjusting and declaring the relations of the native Chiefs to the British Government It was in fact the ordinary instrument of contract, grant or cession used by the Emperors of Hindoostan, and so it has descended to us. The most important privilege ever conceded by the British Government to native princes—the unqualified right of adoption—is solely secured by sunnud, and parts of the territories even of chiefs so considerable as the Maharaja of Patiala are held under no other instrument. It would seem, too, that sunnuds are not necessarily unilateral They often impose on the recipient obligations which he is taken to have assented to through the act of acceptance They appear in fact to have no distinctive peculiarity except that they are couched in the tone of a superior addressing an inferior * * * * * So far, however, from being anomalous, the assumption of superiority in a sunnud is highly

appropriate and natural in India, and I am convinced that examples of a similar assumption having become a common form might be produced in Europe, if the instruments were examined to which the quondam Emperors of Germany were parties

I venture, however, to think that the doctrine of the extreme importance of the distinction between a treaty and a sunnud betrays a deeper misapprehension If European principles are to be applied to the interpretation of the relations between the Indian Government and the native Chiefs they must rather be the principles of the law of nations than those of English municipal law Now, while it is very natural in an English lawyer, who is accustomed to rights and duties flowing directly from conveyances, to attach the greatest importance to their form, it cannot be said that international law attributes any such importance to documents International law has "modes of international acquisition" known to itself, which are set forth at length in the text-books (for instance, Phillimore, Vol 1, pp 235-315), but, following Roman law, it regards documents, not as modes of acquisition, but as evidence of acquisition according to a particular mode It is not, I think, presumptuous to affirm that (though the expression may sometimes be found in writers of some authority) it is in strictness incorrect to say that territory is acquired by treaty By a treaty the high contracting parties may bind themselves to effect or suffer an acquisition of territory after one of the modes known to public law, or, again, a treaty may furnish irrefragable evidence that such an acquisition has taken place, or it may supply binding admissions of the fact But acquisition or alienation cannot be said to be effected by the *treaty itself or by any other document. From these principles* appears to flow the broad doctrine of Wheaton that the form of a treaty is immaterial, and it would seem to be a legitimate conclusion from them that there was nothing inappropriate in the sunnud given to the Nawab of Rampore Strictly speaking, the alienation was effected by the delivery of the territory to the Nawab The sunnud, reciting the intentions of the Crown, supplied what in Roman and international law is known as the *furta causa*

(*Se I L R 2 All 1*)

No 80.

ACT XX OF 1863, RELIGIOUS ENDOWMENTS

(22nd August, 1868)

THIS case has now come back to me for the third time, and it seems to me that a satisfactory opinion upon it will not be obtained unless it be circulated

Proceedings, Foreign Department, Revenue A, September, 1868, No 29

In order to understand it, I think it is only necessary to read the letter from the Central Provinces, dated the 17th of last March, and my own note in the Foreign Department, dated the 11th of last month (put up)

It will be seen that, in order to prevent the fraudulent sale of Government paper held in trust by temple managers, I suggested that the transferability of the notes in their possession should be destroyed by erasing the words which have the effect in law of rendering them negotiable

The docket sent on this note and His Excellency the Governor General's from the Foreign Department to the Financial Department was no doubt misleading, and led the Controller and the officers of the Department to believe, to a certain extent, that their opinion was asked on a question of law, whereas the only point to be ascertained was whether a particular process of issuing and cancelling notes was mechanically practicable

The form of note sent up by the Controller has, however, as it happens, raised a new question So far as it goes, this note would do perfectly well, although the words "for the time being" should be inserted after "Trustees," and, as I advised in my first note, the precaution of writing "not transferable" across the face of the paper should be adopted

But unfortunately this form of note has not any real bearing on the question raised in the Foreign Department.

The suggested note makes interest payable to the trustees of a charitable institution, about which there is no difficulty, but the question in the Foreign Department related to paper in the hands of managers of temples, which are in a very peculiar position

There can be no doubt that much the simplest mode of preventing these frauds would be to make the interest payable to the "Manager or Managers for the time being of the temple of F Y" But here the true point arises, which is whether the issue of such a note is not a violation of section 22 of Sir Cecil Beadon's Religious Endowments Act (XX of 1863) The words I am afraid of are those which debar the Government from having anything to do with the "appropriation of any endowment," but the general spirit of the section should also be considered

I wish to obtain the opinion of my colleagues on the question, because, even if it were one of pure law, any man of common sense could decide it as well as a lawyer. But in truth it is scarcely a question of law. It will be seen that no penalty is—or, indeed, can be—imposed on Government for disregarding the section, which must be considered rather as covering a solemn pledge on the part of Government to abstain from doing certain things than as containing a rule of law.

On the one hand it may be argued that the whole object of the enactment was thoroughly to disconnect Government from temples and mosques and to leave those foundations to the mist of fraud at the hands of their native managers. And it may be contended that a promise of Government to pay interest to the managers of such foundations is, in fact, a security for a Government annuity indistinguishable from an endowment managed by Government.

On the other hand, it may be replied that the promise to pay arises out of money borrowed and that, inasmuch as when a Government loan is raised there is nothing to prevent the Government from taking the money of a temple, so there is nothing to prevent its paying the interest of a promissory note to the managers of a temple. I myself slightly lean to the former view, possibly because I have a clear recollection of the policy, decided enough though not perhaps altogether justifiable, of Sir C. Beadon's Act. Hence, I proposed to minimize the departure from its spirit by issuing the notes to the temple managers by name, but with the words of negotiability struck out. They would thus hold the paper just as they now hold it, but fraud would be nearly impossible, because the paper would not be transferable. But the process is undeniably troublesome and cumbrous, since the local officers would have carefully to watch changes in the management and to cancel the old notes and to issue new ones every time a change took place.

(*See Nos 10, 62, 73 and 87*)

No. 81.

Act XIV of 1866, s 63; Post Office: Functions of Legislative Department.

(25th August, 1868)

Proceedings, Financial Department, Separate Revenue (Post Office), September 1868, Nos. 13–14.

The intention of section 63 of Act XIV of 1866 (the Post Office Act), which allows the Government to make rules prescribing "regulations, conditions and restrictions, according to which letters and other articles shall be posted, forwarded, conveyed and delivered," seems to me obvious enough. The penalty for breach of those

rules is meant to be the non-conveyance or non-delivery of the letter posted in breach of those rules Suppose a rule made that no letter should be posted except in a certain shape or unless under a certain size Such a rule would be quite justifiable, but what would be thought of a criminal penalty imposed on persons posting wrongly-folded letters? It is clear the Government ought not to have the general power suggested by the Advocate General No doubt the case put by Mr Monteath is a comparatively strong one, but the penalty ought to be expressly prescribed by the Act, and I myself am not clear that the law ought to be changed before the experiment has been tried of directing letter-carriers not to deliver letters registered till the receipt has been signed

All Mr Monteath's suggestions should be considered together And here I may remark that the Secretariat note recommending that the question be referred to the Legislative Department "for consideration" appears to indicate that a very stringent order recently made by the Governor General in Council has not been communicated to the Financial Department It is to the effect that nothing should go to the Legislative Department unless all matters of policy have been considered and decided either departmentally or (in important cases) by the entire Executive Government Unless in specially excepted cases, the Legislative Department is not an initiating department, but only carries out ministerially the orders of the Executive Government. It is very important that this principle should be borne in mind.

No 82

Act III of 1872, Brahmo Somaj Marriages

(4th September, 1868)

Proceedings, Legislative Department, May, 1872, No 173

At the request of the Viceroy, I had recently an interview with Babu Keshub Chunder Sen, the leader and emissary of the sect known as the Brahmo Somaj The Brahmos have of late years become unwilling to contract marriage, or to allow their children to contract marriage, with the ceremonies practised among Hindus It seems, however, that after abandoning these practices, they consulted the Advocate General as to the legal consequences of so doing, and he advised them that inasmuch as they had *quoad* their marriages ceased to be Hindus, but had not conformed to the discipline and rites of any religion recognized in India, it was clear in his opinion that their marriages were invalid, and that the issue were illegitimate The Brahmos, therefore, deputed the Babu to pray the Government of India for legislative relief It seems

to me clear that relief in some form ought to be given, since it cannot be the policy of the Queen's Government in India to debar any class of Her Majesty's subjects from contracting lawful marriage

The Bill prepared with the object of giving relief is now circulated Its principle may be said to have been long since affirmed by the Indian Government and Legislature, since it is only a slight extension of the principle embodied in Lord Dalhousie's so-called Lex Loci Act, XXI of 1850 The defect of that Act, which was perhaps accidental, is that it only contemplates the first generation of converts or dissidents from Hinduism This generation is relieved from all civil disability, but it appears not to have struck the framers of the law that provisions were required to meet the case of the second and ulterior generations in respect of marriage and inheritance In the course of preparing the Bill, however, some difficulties have presented themselves, which have made me think it desirable that the Bill as drafted should be seen by the whole Council

It has been found unavoidable to make the measure more general than was at first intended I certainly hold it to be good policy in India, considering the unknown depths of native feeling on the subject, to confine relief in matters connected with religion as much as possible to the class which seeks it and establishes a case for it. On the same principle, therefore, on which the relief of the Native Converts' Re-marriage Act was confined to Christians, though there may have been other classes in the same position, I would gladly have limited the operation of this Bill to the Brahmo sect But, after much conversation with Babu Keshub Chunder Sen, I find that the sect has passed through many phases of religious feeling. The process by which it is recruited, the abandonment by young educated natives of Hinduism and of Hindu rites, is unquestionably on the increase, but reluctance to enroll themselves in any one sect, or to profess any definite creed, is increasing also

In the column of the register of the Calcutta University in which the "religion" of the undergraduates is recorded, may be seen every sort of novel creed "Theist," "Vedaist," "Pantheist" and "Spiritualist" are among the commonest, and it is to be recollected that the young men who so described themselves have about reached the age at which natives marry If, then, we were to confine the measure to "Brahmos," we might have applicants for a fresh measure declaring that they could not conscientiously subscribe to the Brahmo creed

Hence it has been found necessary to make the persons intending to contract marriage declare simply that they do not profess Christianity, and that they object to be married according to the rites of the "Hindu, Mahomedan, Buddhist, Parsee, or Jewish" religion There are of course other "recognized religions" in India besides these, but it does not seem neces-

sary to provide for the case of objection to marry according to the rites of the Gond or Sontal fetishism

The question for the Government is whether there is any political danger in this generality. The Bill is in substance a Bill to legalize civil marriages in India I should answer the question in the negative, because, as I said before, I consider its principle to have been settled in all its scope by the Lex Loci Act. The civil marriage of *Christians* in India, *i e*, marriage by a Registrar, has, I should observe, been legalized by Act of Parliament

Babu Keshub Chunder Sen wished *fourteen* fixed as the marriageable age for girls The religious opinions of native girls of that age not being probably of much importance, it struck me the power of civil marriage might be abused by inducing the daughters of orthodox Hindus to marry against their parents' wishes Accordingly, section 2, clause 3, of the Bill provides that, though a female can contract marriage at fourteen years complete, she cannot contract it without the consent of her parents or guardians until she has completed eighteen years

Under section 3, the Registrar of these marriages is to be appointed by the Local Government, but he may be, and probably will be, generally the Registrar of Assurances, who is the Marriage Registrar already for Parsees

Section 17, which is intended to validate the past marriages of Brahmos, requires attention

The table of prohibited degrees appears, I confess, to me somewhat unnecessarily and pedantically full, but it is that desired by the Brahmos themselves, and I am told it is in accordance with native ideas, and that it is founded on the notion that persons who can perform the *shradha* together cannot intermarry

I ought to state that Babu Keshub Chunder Sen was anxious to have a legislative declaration that the descendants of persons marrying under the Act should inherit according to the Law of Inheritance applicable to the last ancestor who professed a recognized native religion But I have abstained from complying with this request because it seems to me that all which the Brahmos require is given by the existing law as laid down by the Privy Council in a most important case, *Abraham* v *Abraham* (Moore's Indian Appeals, p 195) It was there decided that a native abandoning Hinduism or Mahomedanism as a religion may at pleasure continue to live under Hindu or Mahomedan civil law, or may exchange it for any other recognized set of usages The provision, therefore, requested by the Brahmos would in reality abridge their liberty A Brahmo may wish to adopt Christianity and with it (as was the case with the parties in *Abraham* v *Abraham*) English law There seems no reason for preventing his doing so

No 83

SALT-DUTY

(19th September, 1868)

Proceedings, Financial Department, Separate Revenue, October, 1868, No 27

As in the case of the proposals for a new mode of estimating our opium revenue, I think we are under great obligations to Mr Strachey for the pains and skill with which he has examined a most difficult question

I feel specially indebted to him myself as an English Member of Council necessarily much dependent on the evidence of others for my opinions While I trust I have given proper weight to the strong and decided view of this subject known to be taken by the Viceroy, I have nevertheless felt that there was a lack of positive recorded evidence to which appeal could be made, and that, on the whole, the accessible testimony pointed to a conclusion as to the pressure of the salt duties on the people different from that which the Government seems now disposed to accept

I am bound to state my impression that, in respect to the Lower Provinces of Bengal, there is not even now a sufficiency of evidence that the price of salt presses hardly on the people, and I venture to hope that enquiry will be made of the local authorities before the proposals under consideration are adopted But Mr Strachey's paper appears to me to go a long way to prove the proposition with which it starts as applied to the North-Western Provinces, Oude, part of the Central Provinces and part of the Punjab This proposition is that "much hardship is caused to the poorer classes in many parts of this Presidency by the high prices and the insufficient supply of salt"

Mr Strachey seems to me further to have shown that the high prices are mainly owing to the insufficient supply—that this insufficient supply is greatly attributable to the perverse system under which the salt duties are levied, and that the proper and urgently-needed remedies are the construction of a railway to the sources of supply in Rajputana, and the utilization of those which exist in our own territories I think, too, that he has made out a strong case for the abolition of the frontier duties on the export of sugar

But, when I come to his specific proposals for a reduction of the salt duties, I must frankly say that the demonstration does not appear to me to be equally complete After showing that the consumption of what among a grain-eating population is, if not a necessary, at all events an essential comfort of life, does not nearly come up to the probable inclination of the people, and after pointing out the causes of this inadequate consumption, Mr. Strachey, in the 21st paragraph of his Minute, lays down broadly that "the mere reduction of duty would give very little relief to the people" He adds—"We should lose revenue,

and the quantity of salt imported would not seriously increase" I am not sure whether I press these words too hardly when I suppose that they apply to the whole duty on salt At all events, when Mr Strachey in his 26th paragraph proposes to reduce the duties by eight annas in Upper India and four annas in Lower Bengal, he immediately adds that "it will not be safe to reckon on any important increase of consumption in the first year" And it appears that his utmost hopes do not lead him to anticipate that the augmentation of consumption will be represented by more than a recovery of 4½ lakhs, out of 44¼ lakhs, of revenue given up

In any country it may be expected that a reduction of duty, very small in proportion to the total cost of the duty-paying article, will be without immediate effect on price and consumption, and in India especially it seems likely that immobility of habit would lead to the fraction of the duty abandoned by Government remaining for a long while in the hands of the dealer. Of course, there are cases in which this must be submitted to at the outset of a new policy, but the present does not certainly seem to be one of those cases, since I understand Mr Strachey to be of opinion that, until certain considerable public works have been carried into execution, hardly any reduction of duty would enable the dealers to import into Oude and the North-West appreciably larger quantities of salt, and to bring it to the doors of the consuming millions

The conclusion, then, which I am compelled to draw is that, if effect be given to Mr Strachey's proposals as to reduction of duty, the revenue given up will, to the extent of 40 lakhs at all events, simply swell the profits of the dealers in salt, and that, although the consumer in Lower Bengal may in future years derive some advantage from the reduction, the consumer in Upper India cannot be appreciably benefited until a railway to Rajputana has been constructed, and until the saline sources in Oude have been utilized under a new system

If it be absolutely true that there is a "salt famine" in the North-West and Oude, which can only be relieved by providing facilities of conveyance which it will take years to provide, Sir R Temple's proposals are open to the same objections as Mr Strachey's, but, as it is probable that this strong statement admits of some limitation, the Financial Member's scheme would probably be more operative than Mr Strachey's as involving a greater reduction of duty But, I must confess, I cannot get over the difficulty felt by Sir W Mansfield If the problem is to bring up the consumption of the Bengal Presidency to the existing standard of Madras and Bombay, how can we adopt a measure which will tend to lower the standard of the Southern Presidencies?

Turning again to Mr. Strachey's proposals, I do not understand that either he or Sir W Mansfield, who agrees with him,

expect in point of fact that any present perceptible relief will be given to the consumer It is the "inauguration" of a new salt policy which they desire They wish, if I am not mistaken, to commit the Government by a decided step to a reduction of the salt duties and to an extension of direct taxation I perfectly understand all that is generous in this programme, and I do not for a moment quarrel with it because it may be called "sentimental." But, with genuine deference to gentlemen whose studies have lain in this direction so much more than my own, I doubt whether the plan which commends itself to them can be justified on financial principles I can hardly be wrong in saying that, if taxation be reduced with a view to give relief to a particular class, the relief should be a real relief flowing under the operation of economical laws from the measure of reduction Still more strongly do I think that no class should be asked to submit to additional taxation unless a clear material advantage is conferred either on itself or on some other class which has an equitable claim to be relieved at its expense It is surely without precedent that a Minister of Finance should propose to increase or reduce taxation without tangible prospect of a particular result, solely by way of a moral guarantee that he or his successor will hereafter add to or diminish the public burdens at a time when that result is attainable

The question is one upon which I give my opinion with hesitation, but, upon the information before us, I think that further enquiry should be made as to the incidence of the salt duties in Lower Bengal, and that, all possible speed being made with the works required for an augmentation of supply in Upper India, the reduction of duty should be postponed till those works approach completion, when—and when only, as it seems to me—the reduced duties can have fair play

Mr Strachey has referred to the conclusion drawn by me from the fact stated on high authority that salt was not usually paid for, but given by the dealer ostensibly for nothing along with the grain purchased Mr Strachey argues that this proves nothing more than the inability of the people to buy more than the smallest quantities of salt He may be right, but the fact was certainly adduced in Council as explaining why it is that the pressure of the salt duties is not consciously felt or complained of by the people

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No 84

LEGISLATIVE DEPARTMENT, STATUTE 33 VICT, C 3, SS 1 AND 2

(22nd September, 1868)

Proceedings, Home Department (Legislative), October, 1868 No 11

I BEG to propose to the Government certain changes in its Legislative Department which are calculated, in my opinion, to increase its efficiency and usefulness.

It probably did not escape the notice of my colleagues that the Secretary of State for India, in withdrawing the "Governor General of India" Bill lately before Parliament, suggested—and indeed promised for himself, if he should be in office—that it should, immediately on its re-introduction, be referred to a Select Committee. The Bill, I need scarcely state, proposed to invest the Governor General in Executive Council with a power of summary legislation in respect of the less advanced parts of the Indian territories. The occurrences on the North-Western frontier have more recently called our attention to the advantages which would attend our possession of this power, and we have expressed to the Secretary of State a hope that the Queen's Government will propose to confer it on us by any measure relating to India which may be submitted to Parliament. I think we may confidently hope that much time will not elapse before we have authority to legislate summarily for the wilder parts of the country.

It seems obvious that, as soon as we begin to exercise this power of summary legislation, the functions of the Legislative Council will be somewhat limited, but the duties of the Legislative Department of the Government of India will acquire increased importance.

Certain orders recently made by the Viceroy will also add considerably to the responsibilities of the Legislative Department. As the law requires the assent, not of the Governor General in Council but of the Governor General individually, to all Bills passed by the Local Legislatures, and as it is the previous sanction of the Governor General individually which is prescribed for some of those Bills, local Bills used until lately to be sent to the Law Member of Council, and sometimes to other Members, for an informal and unofficial opinion. But His Excellency has recently ordered that local Bills of all kinds, and sent up for whatever purpose, shall first be considered in the department to which their subject naturally belongs,—for instance, in the Public Works or Financial Department,—and that a departmental opinion on their *policy* shall there be given, all or part of the Government joining in that opinion according to the usual practice. They are then to be sent without exception to the Legislative Department, where an opinion will be given as to their technical form and sufficiency, on the responsibility of the Law Member of Council. Finally, the Governor General will make up his mind as to the course proper to be pursued in according sanction or assent.

There seems, therefore, to be good opportunity at the present moment for calling attention to defects in the organization of the Legislative Department. It is difficult not to speak of the "Legislative Department" but in point of fact there is no such department. There is a Legislative Branch of the Home Department, and the Legislative Department is officially a sub-

department of the Home Office The strictness with which this subordination was enjoined upon us after the enactment of the Indian Councils Act in 1861 was doubtless connected with the desire then prevalent to prevent the new Indian Legislature from imitating the former Legislative Council and (to use a phrase which I have heard and read) "giving itself the airs of a Parliament" It is not necessary to consider here whether the measures taken to ensure that object have or have not been successful No doubt the vastly preponderant opinion in India is that they have been too successful, and that the present Indian Legislature is wholly wanting in independence But, whether they have succeeded or not, I think all my colleagues will agree with me that the dependence of the Legislative Department on the Home Office has not contributed in the slightest degree to the result It has been wholly without influence one way or the other

The advantage expected from the connection of the two offices not having been obtained from it, I proceed to mention the inconveniences of various kinds which an experience of six years shows me to be entailed by it The first is the occasional great and annoying delay With the press of business which has set in upon all our offices, the passage of papers through two of them is always a cause of delay. Such delay is the more likely to occur in the case of the Home and Legislative Departments, because they have no necessary or natural relation of any sort to one another During the regular sittings of the Council for making Laws and Regulations, the utmost inconvenience constantly results from the cumbrousness of the existing machinery The paper marginally described, which has been prepared in the Legislative Department, and to which I shall shortly call the special attention of my colleagues, conclusively proves—what to the members of the Government perhaps requires no proof—that the vast majority of our Bills are local Bills, urgently recommended to us by the Local Governments Unless they are emergent, or unimportant, or of a very special character, they are discussed and passed by the Legislative Council at Calcutta during a space of four or five months In the course of this discussion, and generally in that stage of it when the Bill is before a Select Committee, constant references and requests for explanation and for further statement of facts have to be made to the Local Government from which the measure emanated Such references take the form of a letter, not from the Legislative Department, but from the Home Department, under the signature of the Home Secretary or his Under-Secretary The offices of the two departments are, I should observe, in different buildings, and their work is kept wholly apart The inconveniences

A paper showing in each case the authority at whose suggestion the Acts of the Governor General in Council from No I of 1865 to No XXXVII of 1867 were passed.

of precedence it is proposed to give him special rank India, however, is not a country in which any anomaly of social position is trivial or harmless, and I fear that, unless the anomaly admitted to exist in the case of the Legislative Secretary be rectified, any annoyance resulting from it will not be confined to the existing incumbent, but the difficulty of properly filling his place hereafter may be needlessly aggravated

My proposal is to give reality to the separation which already *de facto* exists in all essential matters between the Home and Legislative Departments Almost all that is necessary is to empower the latter department to receive communications direct from the other offices of the Government of India, and to correspond directly with the Local Governments In making the severance, I would affirm broadly the principle—which, however, is well understood and acted upon already in the Legislative Department—that the Legislative Department originates nothing, but under the superintendence of the Law Member of Council clothes with a technical shape the measures sanctioned by the Executive Government It may possibly happen that a Local Government may send up a proposal for legislation direct to the Legislative Office, it should be distinctly laid down that in such a case the papers should be at once transferred to the proper executive department for an opinion on the policy of the proposal they embody

I do not propose to restore to the Legislative Secretary his former designation of Clerk of the Council, which may sound too Parliamentary I would gladly call him Secretary to the Government of India in the Legislative Department, but there is some degree of doubt, under the Statute before quoted, whether a barrister could be appointed to such an office except under special conditions The name of office which I therefore propose is Secretary to the Council of the Governor General for making Laws and Regulations

I think it right to state my impression that, when the legislative machinery of this Government was so greatly modified in 1861, it was supposed, both at home and in India, that the changes then effected might ultimately enable us to appoint a civilian to the Legislative Secretaryship It may have been believed that legislation would diminish, that the Law Member of Council would have more time to spare, and that, perhaps, with the assistance of an Additional Under-Secretary in the Home Department, he would be able to undertake personally the preparation of all legislative measures If such expectations were entertained, there is no doubt they have been signally falsified

It is quite notorious that legislation has not diminished in aggregate quantity, though the importance of individual measures may not be greater than it was before 1861 The fact is observed by all and complained of by many I propose shortly to

submit to the Viceroy and my colleagues an attempt to explain the causes of this increase I will only say now that those causes appear to me to be altogether independent of the will and wish of the Government of India The general cause may be described as being the steady emergence of the country from a state of discretionary (or, as some call it in its more decided forms, patriarchal) government into a state of government by law—an emergence which seems to continue under the operation of forces quite discernible, but incapable, so far as we can see, of being checked The special cause, as appears plainly from the paper before-mentioned and put up, is the urgency of the Local Governments in pressing on us particular legislative measures as necessary for the good government of the territories which they administer and for the discharge of their primary duties to the people What occasionally is the degree of that urgency may be illustrated by a very recent demand by the Lieutenant-Governor of the North-West for a law to repress female infanticide Sir W Muir in his letter stops very little short of telling us that, owing to our cautious delay in carrying through a measure of exceptional prevention, the blood of all the murdered infants is on our hands

While legislation has certainly not diminished, the work devolving on the Law Member of Council in what may be called his executive capacity has greatly increased I am not now speaking of the collective work of the Government, though no doubt that has become much heavier than it was, but of departmental work Although the Law Member of Council has ordinarily no department under him except the Legislative Department, he receives from all departments such questions as appear to involve in any way a point of law It is possible that the Government formerly referred questions of this description to the Advocate General, but they have so multiplied of late as to render that course impossible, and nothing now goes to the Advocate General unless there is some special reason why the Government should be in a position to say that it has acted under legal advice I do not believe that I overstate the fact when I say that work of the kind I have indicated has quadrupled within so short a period as three years The chances, too, are that it will steadily increase, since its cause is identical with that which is the secret of the call for legislation, the growing necessity in India for conformity to legal rule

The legislative staff, which was created when the former Legislative Council began its labours, was not less, but greater, than the present Legislative establishment There was a Clerk of the Council, a barrister, and this office was long filled by the present Chief Justice of the North-Western High Court There was also a Clerk Assistant, a native lawyer, the incumbent of the office was the colleague we have just lost, Prosunno Coomar Tagore, the first practitioner of his day The Clerk Assistant-

ship was abolished in 1861, possibly under the idea, which I regret to say has proved a very mistaken one, that the same assistance would be given by the native Members of Council I am clearly of opinion that the staff cannot be further diminished or altered in character It is simply impossible that the Law Member of Council should himself do all the drafting which is required in the department, though it may be expected of him that he give the instructions for all Bills and sketch their outline, and that he settle and revise the drafts.

On the whole, I am convinced that there must always be a barrister at the head of the Legislative Department, distinct from the Law Member of Council, but of course subordinate to him This functionary should be selected, not in virtue of the same qualifications which are supposed to be required in the Law Member, but for his special skill in drafting, and there is no better guarantee for the possession of this skill than an apprenticeship in English conveyancing I have to express a strong opinion that, so far from good drafting being out of place in India, it is more required than at home I have heard it said that a less precise mode of framing Acts would be better for unlearned officials My own experience points to the opposite conclusion I practically find that the interpreter of written law who has not had a technical legal training sticks closer to the letter, and is more put out by ambiguous and unprecise language, than is the regularly-trained lawyer That our Acts ought not to exhibit that superfluity of detail and meagreness of general propositions which formerly characterized English Acts of Parliament must certainly be admitted, but this only amounts to allowing that our drafting ought to be good and of the most approved modern type

It seems to me, moreover, to be due to the Additional Members of Council that there should be a Barrister Secretary attached to the Council They are little disposed to offer unreasonable opposition, but they may occasionally have amendments to propose in Government Bills, and those amendments ought to be put into proper technical shape It appears scarcely fair to them that they should be driven for assistance to the Law Member of Council, who has of course committed himself to the Government measure as it stands I may state as a fact that during the regular sittings of the Council a great part of the Legislative Secretary's time is given up to the Additional Members of Council, who freely resort to him for explanations and occasionally for assistance

This Minute is accompanied by a copy of a letter addressed by our late colleague, Mr Massey, to the present Legislative Secretary I put it up because it shows that Mr Massey, who was kind enough to take charge of the Legislative Department during my absence from India, agreed with me as to the expediency of the changes which I propose The letter, however, dwells on

No 85

OVER LEGISLATION

(1st October, 1868)

Proceedings Home Department (Legislative) October 1868 No 9

THE accompanying paper, "showing in each case the authority at whose suggestion the Acts of the Governor General in Council, from No 1 of 1865 to No XXXVII of 1867, were passed" has been already seen by the Viceroy and my colleagues I have to admit that it was originally prepared to furnish materials for an answer to statements which I regarded as conveying some degree of censure on myself It seemed to me that many persons, to whose opinion great respect is due, were getting more and more to believe or suspect that legislation in India was unnecessarily profuse, and that its abundance was attributable either to morbid activity in the Law Member of Council, or to something faulty in the constitution of the Legislature So long as such statements were couched in general terms, it appeared to me difficult or impossible to meet them satisfactorily, since it is undoubtedly true that legislation in India has not slackened, as it was expected to do, and even shows a tendency to increase Something, therefore, like a brief historical analysis of recent legislation appeared to be required, and this the paper gives, though of course within scanty limits The fact, however, that it was compiled for a reason in some degree personal will explain why

the enquiry, of which it states the results, was not carried back beyond the beginning of 1865 The documents relating to proposals for legislation which are in the Legislative Department are exceedingly numerous and voluminous, and the labour of analysing them proportionately heavy I did not think myself justified in directing the enquiry to be continued through any greater number of past years, but there is no reason to suppose that, if it had been so continued, it would have suggested any different inferences

It may be necessary to explain that the communication mentioned in the third column is always the one in which the request for legislation was first distinctly made by the Local Government or authority indicated But in several cases it was preceded by correspondence more or less leading up to legislation, and in many, indeed in most, cases it was followed by communications reiterating the demand for a legislative measure, often in language of extreme urgency

I proceed to state the conclusions to which this paper seems to me to point If the Members of Government do not agree in those conclusions, I shall certainly be surprised, but I can hardly say I shall be disappointed Nothing would give me sincerer gratification than any practical suggestion of an expedient for reducing the quantity of our legislation and sensibly diminishing the annual addition to the Indian Statute-book

The first conclusion which I draw is that next to no legislation originates with the Government of India. The only exceptions to complete inaction in this respect which are worth mentioning occur in the case of Taxing Acts—though, as there is often much communication with the Local Governments on the subject of these Acts, the exception is only partial—and in that of a few Acts adapting portions of English Statute law to India. Former Indian Legislatures introduced into India certain modern English Statutes limiting their operation to "cases governed by English law" The most recent English amendments of these Statutes were, however, not followed in this country until they were embodied in Indian Acts by my predecessor, Mr Ritchie, and myself, in accordance with the general wish of the Bench and Bar of the High Courts Examples of this sort of legislation are Acts XXVII and XXVIII of 1866, which only apply to "cases governed by English law"

The second, and much the most important, inference which the paper appears to me to suggest is, that the great bulk of the legislation of the Supreme Council is attributable to its being the Local Legislature of many Indian provinces At the present moment, the Council of the Governor General for making Laws and Regulations is the sole Local Legislature for the North-Western Provinces, for the Punjab, for Oude, for the Central Provinces, for British Burma, for the petty Province of Coorg, and for many small patches of territory which are scattered

among the Native States Moreover, it necessarily divides the legislation of Bengal proper, Madras and Bombay with the local Councils of those provinces For, under the provisions of the High Courts Act of 1861, it is only the Supreme Legislature which can alter or abridge the jurisdiction of the High Courts, and, as this jurisdiction is very wide and far-reaching, the effect is to throw on the Governor General's Council no small amount of legislation which would naturally fall on the local Legislatures Occasionally, too, the convenience of having but one law for two provinces, of which one has a Council and the other has none, induces the Supreme Government to legislate for both, generally at the request of both their Governments

Now, these provinces for which the Supreme Council is the joint or sole Legislature exhibit very wide diversities Some of these differences are owing to distinctions of race, others to differences of land-law, others to the unequal spread of education Not only are the original diversities between the various populations of India believed now a-days to be much greater than they were once thought to be, but it may be questioned whether, for the present at all events, they are not rather increasing than diminishing under the influence of British government. That influence has no doubt thrown all India more or less into a state of ferment and progress, but the rate of progress is very unequal and irregular It is growing more and more difficult to bring the population of two or more provinces under any one law which goes closely home to their daily life and habits

Not only, then, are we the Local Legislature of a great many provinces, in the sense of being the only authority which can legislate for them on all or certain subjects, but the condition of India is more and more forcing us to act as if we were a Local Legislature of which the powers do not extend beyond the province for which we are legislating The real proof, therefore, of our over-legislation would consist, not in showing that we pass between thirty and forty Acts in every year, but in demonstrating that we apply too many new laws to each or to some one of the provinces subject to us Now, I will take the most important of the territories for which we are exclusively the Legislature—the North-Western Provinces, and I will take the year in which, judging from the paper, there has been most North-Western legislation—the year 1867 The amount does not seem to have been very great or serious I find that in 1867, if Taxing Acts be excluded, the North-West was affected in common with all or other parts of India by an Act repressive of Public Gambling (No III), by an Act for the Registration of Printing Presses (No XXV), and by five Acts (IV, VII, VIII, X and XXXIII) having the most insignificant technical objects I find that it was exclusively affected by an Act (I) empowering its Government to levy certain tolls on the Ganges, by an Act

(XXII) for the Regulation of Native Inns; by an Act (XVIII) giving a legal constitution to the Courts already established in a single district, and by an Act (XXVIII) confirming the sentences of certain petty Criminal Courts already existing I find further that, in the same year, 1867, the English Parliament passed 85 Public General Acts applicable to England and Wales, of which one was the Representation of the People Act. The number of Local and Personal Acts passed in the same year was 188. All this legislation too, came, it must be remembered, on the back of a vast mass of statute-law, compared with which all the written law of all India is the merest trifle Now, the population of England and Wales is rather over 20 millions, that of the North-Western Provinces is supposed to be above 30 millions No trustworthy comparison can be instituted between the two countries, but, regard being had to their condition thirty years ago, it may be doubted whether, in respect of opinions, ideas, habits and wants, there has not been more change during thirty years in the North-West than in England and Wales.

A third inference which the paper suggests is, that our legislation scarcely ever interferes, even in the minutest degree, with private rights, whether derived from usage or from express law. It has been said by a high authority that the Indian Legislature should confine itself to the amendment of Adjective Law, leaving Substantive Law to the Indian Law Commissioners It is meant, no doubt, that the Indian Legislature should occupy itself, *proprio motu*, with improvements in police, in administration, in the mechanism and procedure of Courts of Justice This proposition appears to me a very reasonable one in the main, but it is nearly an exact description of the character of our legislation We do not meddle with private rights; we only create official duties No doubt Act X of 1865 and Act XV of 1866 do considerably modify private rights, but the first is a chapter and the last a section of the Civil Code framed in England by the Law Commissioners

The paper does not of course express the urgency with which the measures which it names are pressed on us by their originators—the Local Governments My colleagues are, I believe, aware that the earnestness with which these Governments demand legislation, as absolutely necessary for the discharge of their duties to the people, is sometimes very remarkable. I am very far indeed from believing that, as they are now constituted, they think the Supreme Council precipitate in legislation I could at this moment name half a dozen instances in which the present Lieutenant-Governors of Bengal and the North-West deem the hesitation of the Government of India in recommending particular enactments to the Legislature unnecessary and unjustifiable

While it does not seem to me open to doubt that the Gov-

ernment of India is entirely free from the charge of initiating legislation in too great abundance, it may nevertheless be said that we ought to oppose a firmer resistance to the demands of the Local Governments and other authorities for legislative measures. It seems desirable therefore, that I should say something of the influences which prompt these Governments, and which constitute the causes of the increase in Indian legislation. I must premise that I do not propose to dwell on causes of great generality. Most people would admit that, for good or for evil, the country is changing rapidly, though not at uniform speed. Opinion, belief, usage and taste are obviously undergoing more or less modification everywhere. The standard of good government before the minds of officials is constantly shifting, perhaps it is rising. These phenomena are doubtless among the ultimate causes of legislation, but, unless more special causes are assigned, the explanation will never be satisfactory to many minds.

I will first specify a cause which is in itself of a merely formal nature, but which still contributes greatly for the time to the necessity for legislation. This is the effect of the Indian Councils Act of 1861 upon the system which existed before that date in the Non-Regulation Provinces. It is well known that, in any strict sense of the word, the Executive Government legislated for those Provinces up to 1861. The orders, instructions, circulars and rules for the guidance of officers which it constantly issued were, to a great extent, essentially of a legislative character, but then they were scarcely ever in a legislative form. It is not matter of surprise that this should have been so, for the authority prescribing the rule immediately modified or explained it, if it gave rise to any inconvenience, or was found to be ambiguous. But the system (of which the legality had long been doubted) was destroyed by the Indian Councils Act. No legislative power now exists in India which is not derived from this Statute, but, to prevent a wholesale cancellation of essentially legislative rules, the 25th section gave the force of law to all rules made previously for Non-Regulation Provinces by or under the authority of the Government of India, or of a Lieutenant-Governor. By this provision an enormous and most miscellaneous mass of rules, clothed to a great extent in general and popular language, was suddenly established as law, and invested with solidity and unchangeableness to a degree which its authors had never contemplated. The difficulty of ascertaining what is law and what is not in the former Non-Regulation Provinces is really incredible. I have, for instance, been seriously in doubt whether a particular clause of a circular intended to prescribe a rule or to convey a sarcasm. The necessity for authoritatively declaring rules of this kind, for putting them into precise language, for amending them when their policy is doubted, or when tried by the severer judi-

cial tests now applied to them they give different results from those intended by their authors, is among the most imperative causes of legislation Such legislation will, however, diminish as the process of simplifying and declaring these rules goes on, and must ultimately come to a close

I now come to springs of legislation which appear to increase in activity rather than otherwise First among these I do not hesitate to place the growing influence of Courts of Justice and of legal practitioners Our Courts are becoming more careful of precise rule both at the top and at the bottom The more careful legal education of the young civilians and of the younger native Judges diffuses the habit of precision from below, the High Courts, in the exercise of their powers of supervision, are more and more insisting on exactness from above

An even more powerful influence is the immense multiplication of legal practitioners in the country I am not now speaking of European practitioners, though their number has greatly increased of late, and though they penetrate much further into the Mofussil than of old The great addition, however, is to the numbers and influence of the native Bar Practically a young educated native, pretending to anything above a clerkship, adopts one of two occupations,—either he goes into the service of Government, or he joins the native Bar I am told, and I believe it to be true, that the Bar is getting to be more and more preferred to Government service by the educated youth of the country, both on the score of its gainfulness and on the score of its independence

Now, the law of India is at present, and probably will long continue to be, in a state which furnishes opportunity for the suggestion of doubts almost without limit. The older written law of India (the Regulations and earlier Acts) is declared in language which, judged by modern requirements, must be called popular The authoritative native treatises on law are so vague that, from many of the dicta embodied in them, almost any conclusion can be drawn More than that, there are, as the Indian Law Commissioners have pointed out, vast gaps and interspaces in the Substantive Law of India, there are subjects on which no rules exist, and the rules actually applied by the Courts are taken, a good deal at haphazard, from popular text-books of English law Such a condition of things is a mine of legal difficulty The Courts are getting ever more rigid in their demand of legal warrant for the actions of all men, officials included The lawyers who practise before them are getting more and more astute, and render the difficulty of pointing to such legal warrant day by day greater And unquestionably the natives of India, living in the constant presence of Courts and lawyers, are growing every day less disposed to regard an act or order which they dislike as an unkindly dispensation of Providence

which must be submitted to with all the patience at their command If British rule is doing nothing else, it is steadily communicating to the native the consciousness of positive rights not dependent on opinion or usage, but capable of being actively enforced

It is not, I think, difficult to see how this state of the law and this condition of the Courts and Bar renders it necessary for the Local Governments, as being responsible for the efficiency of their administration, to press for legislation The nature of the necessity can best be judged by considering what would be the consequences if there were no legislation, or not enough A vast variety of points would be unsettled until the highest tribunals had the opportunity of deciding them, and the government of the country would be to a great extent handed over to the High Courts, or to other Courts of Appeal. No Court of Justice, however, can pay other than incidental regard to considerations of expediency, and the result would be that the country would be governed on principles which have no necessary relation to policy or statesmanship It is the justification of legislation that it settles difficulties as soon as they arise, and settles them upon considerations which a Court of Justice is obliged to leave out of sight

The consequences of leaving India to be governed by the Courts would, in my judgment, be most disastrous The bolder sort of officials would, I think, go on without regard to legal rule, until something like the deadlock would be reached with which we are about to deal in the Punjab, where, if the proportions indicated by the statistics of a single district are maintained throughout the province, the settlement officers have given about a million-and-a-half of most formidable decisions upon fundamental rights to property in land, while the Chief Court has ruled that about seven hundred thousand of these decisions are bad in law But the great majority of administrative officials, whether weaker or less reckless, would observe a caution and hesitation for which the doubtful state of the law could always be pleaded There would, in fact, be a paralysis of administration throughout the country

The fact established by the paper that the duties created by Indian legislation are almost entirely official duties explains the dislike of legislation which occasionally shows itself here and there in India. I must confess that I have always believed the feeling, so far as it exists, to be official, and to correspond very closely to the repugnance which most lawyers feel to having the most disorderly branch of case-law superseded by the simplest and best drawn of statutes The truth is, that nobody likes innovations on knowledge which he has once acquired with difficulty If there was one legislative change which seemed at the time to be more rebelled against than another, it was the supersession of the former Civil Procedure of the Punjab by the

Code of Civil Procedure. The Civil Procedure of the Punjab had originally been exceedingly simple, and far better suited to the country than the then existing procedure of the Regulation Provinces. But two years ago it had become so overlaid by explanations and modifications conveyed in circular orders that I do not hesitate to pronounce it as uncertain and difficult a body of rules as I ever attempted to study. I can speak with confidence on the point, for I came to India strange both to the Code of Civil Procedure and to the Civil Procedure of the Punjab, and, while the first has always seemed to me nearly the simplest and clearest system of the kind in the world, I must own I never felt sure in any case what was the Punjab rule. The introduction of the Code was, in fact, the merest act of justice to the young generation of Punjab officials, yet the older men spoke of the measure as if some ultra technical body of law were being forced on a service accustomed to Courts of primitive simplicity.

While I admit that the abridgment of discretion by written laws is to some extent an evil,—though, under the actual circumstances of India an inevitable evil,—I do not admit the proposition which is sometimes advanced that the natives of India dislike the abridgment of official discretion This assertion seems to me not only unsupported by any evidence, but to be contrary to all the probabilities It may be allowed that in some cases discretionary government is absolutely necessary, but why should a people, which measures religious zeal and personal rank and respectability by rigid adherence to usage and custom, have a fancy for rapid changes in the actions of its governors, and prefer a regimen of discretion sometimes coming close upon caprice to a regimen of law? I do not profess to know the natives of this country as well as others, but, if they are to be judged by their writings, they have no such preference The educated youth of India certainly affect a dislike of many things which they do not care about and pretend to many tastes which they do not really share, but the repugnance which they invariably profess for discretionary government has always seemed to me genuinely hearty and sincere

NOTE —The statement in this Minute that little or no legislation originates with the Government of India must not be understood to imply that the Acts described in the first and second columns of the accompanying paper were not previously assented to and recommended to the Legislature by the Government Without an exception they were, till they were passed, what in England would be called Government Bills, sanctioned as to their policy in the Executive Departments, and clothed with technical shape in the Legislative Department. I mention the point because misapprehension may have been caused by the name of an Additional Member of Council frequently appearing on the back of the Bill During the last two or three years it has been the practice to allow the Additional Members to conduct through Council any Government Bills in which they are specially interested, or relating to a subject of which they have special knowledge. This practice has been found agreeable to the Additional Members, and conducive to the dispatch of business Theoretically an Additional Member can (under some statutory restrictions) introduce into Council any Bill he pleases, but the power is practically not acted upon, though of course amendments not originating with the Government are occasionally moved

(*See No 18*)

No 86.

ACT XXI OF 1869, EUROPEAN VAGRANCY.

(6th October, 1868)

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THE complaint in Mr Sladen's letter of the generally unsatisfactory state of the law as to the lower class of Europeans is too well founded But we are going to take a long step forward by de-Britonizing the loafers

Proceedings, Home Department, 13th February, 1869, Nos 74-104

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No. 87.

ACT XVII OF 1864, OFFICIAL TRUSTEE, RELIGIOUS ENDOWMENTS.

(11th November, 1868)

Proceedings, Foreign Department, Political, A, September, 1869, Nos 98 100

IT appears to me that a very serious difficulty is raised by the Mirza himself He objects that the Official Trustee cannot undertake the trust on account of the proviso to section 8 of Act XVII of 1864, which forbids the Official Trustee to undertake religious trusts. But that proviso was undoubtedly intended to correspond with section 22 of Act XX of 1863, which forbids the Government of India or any officer of Government to "undertake the superintendence of any property granted for the support of any religious establishment, or to take any part in the management or appropriation of any endowment made for the maintenance of any such establishment" Now, even if the whole of clause 2 of the proposed trust-deed be not within this prohibition, it seems to me that the provision for "Kerballa Moalla"—which I imagine to be a sacred place with mosques, etc —must be within it, and to that extent the trust would fail

As, however, His Excellency is inclined to accept the trust, this clause of the deed might go to the Advocate General for his opinion whether the Government or the Official Trustee can undertake such a trust

At the same time I should be glad that these papers should be circulated at Calcutta (with the two Acts above referred to) in order that it may be pointed out to His Excellency and the Government that the Mirza gains nothing but *éclat* from this mode of disposing of his property If the Government or any of its officers becomes trustee, he will be no more than a private trustee, subject to the ordinary rules and liabilities The security will, in fact, be less, since Government officers have no special knowledge of trusts, whereas the Official Trustee is a lawyer devoting his whole attention to this class of questions

The reference to the Advocate General on these points need not delay the circulation of the papers It should be explained to Mr. Cowie what "Kerballa Moalla" is

(See Nos 10, 62, 73 and 80)

No. 88.

ACT XIX OF 1869, ADMINISTRATOR GENERAL.

(1st December, 1868)

Proceedings, Foreign Department, Judicial, December, 1868, Nos. 6 8

THIS is by no means a simple matter. The Act of 1867 merely continues old arrangements, but when it was under discussion the convenience of

placing Berar under the Administrator General of Bombay did not escape notice, but it was not done lest it should lead to a claim for compensation The Administrator General is not a salaried officer, but is paid by a percentage on the estates he gets in We may have the Administrator General of Madras declaring that a considerable portion of his income comes from Berar, and asking us to compensate him for our putting this into the pocket of the Bombay functionary

Still the case is a strong one, and I think we should address the Madras Government on the subject, pointing out to them the reasons why Madras is so inconveniently placed for the administration of the estates in Berar, and why Bombay is so much to be preferred, and asking them whether, regard being had to the whole emoluments of the Administrator General's office, there would be anything inequitable in removing Berar from the sphere of his duties

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No. 89.

KUTCH SHIPS, STATUTE 3 & 4 VICT, C 56, S 54, ACT X OF 1841.

(8th December, 1868)

Proceedings, Foreign Department, Political, A, December, 1868, Nos 403 412.

IT seems to me that the Bombay Advocate General is right, and that we cannot enlarge Act X of 1841 Zanzibar is not within the ordinary legislative power of this Government, and I consider it very doubtful whether we can delegate to the Consul the power of admitting the class of ships referred to to the privileges of British ships under Statute 3 & 4 Vict, cap 56, section 54

(See Nos 35 and 37)

No. 90

SECUNDERABAD, RETROSPECTIVE EFFECT OF ORDERS APPLICABLE TO FOREIGN TERRITORY

(15th December, 1868)

Proceedings, Foreign Department, Judicial, A, December, 1868, Nos 19 20

I UNDERSTAND that Secunderabad is not British territory, Sir R Temple being my authority This being so, we have legislative authority derived from the Nizam If the place were part of British India, I should have doubts of our power to give "retrospective effect" to some of these orders As it is, I think the notifications may be made

No. 91

APPLICATION OF ENACTMENTS TO FOREIGN TERRITORY

(29th December, 1868.)

SIR R. Temple can best give an opinion on the question of policy. I myself see no objection. Let me remark that legislative enactments are not *extended*, but *applied*, to the Assigned Districts, which are not part of British India

Proceedings, Foreign Department, Political, A, February, 1869, Nos 269-271

(See Nos 21, 39 and 71)

No 92.

SLAVERY .

(22nd April, 1869)

THE Statute-law on the subject of slavery and the slave-trade appears to be as follows All trafficking in slaves, including under the comprehensive language of 5 Geo IV, c 113. "all dealing or trading in, purchasing, selling, bartering, or transferring slaves, or contracting for the above objects, or carrying away or removing or contracting for conveying away or removing slaves or importing slaves or shipping them or detaining them on board ship," is forbidden to subjects of the Crown under heavy penalties From this Statute, however, those possessions of the Crown were excepted in which slavery was at the time (1824) legal Afterwards, by 3 & 4 William IV, c 73 (1833), slavery was abolished throughout the British dominions, but the East Indies (section 64) was excepted Finally, by Lord Brougham's Act, 6 & 7 Vict., c 98 (1843), the provisions of 5 Geo IV, c 113, were extended to British subjects even in foreign places where slavery was by the local law legal

Proceedings, Foreign Department, Political, A, July, 1869, Nos 229 230

The Charter Acts contain directions to the East India Company to mitigate and ultimately abolish slavery This direction was obeyed in sections 370 and 371 of the Indian Penal Code, which absolutely prohibit slavery and slave-dealing in British India.

The present case is anomalous, because the Kutchees are not strictly subjects of the Queen, but of the Rao of Kutch These Kutchees, however, claim and receive protection in the Persian Gulf and other places, which is accorded to them on the ground that our treaties with the Rao forbid his having any foreign relations And the condition which we attach to our protection is that these Kutchees, like our own subjects, abstain from slave-dealing

I see that in our letter to the Bombay Government of November 6th, 1868, paragraph 7, it is stated that "slavery" would be put down by the British Government in Native States. I do not know whether "slavery" is here used for slave-*dealing* or slave-*owning*. But surely this Government never did or does meddle with domestic slavery in Native States, and I confess I was unaware that it prohibited the land traffic in slaves.

My view, therefore, is that the steps taken by Mr Churchill must be legally justified on the ground that the treaty impliedly compels the Sultan to take sufficient measures for preventing the classes entitled to our protection from engaging in the export of slaves from Zanzibar. The limitation which he has imposed on the power of purchase seems to me only justifiable if it be necessary to prevent the slave trade going on under colour of merely domestic arrangements. Whether Mr Churchill's limit is needed for this purpose is a question of fact.

With regard to the Consul's request for a vessel of the Indian Navy, I can only repeat that in law there is no longer an Indian Navy.

(*See Nos. 8 and 98.*)

No. 93.

North-Western Provinces High Court, Statute 24 & 25 Vict, c 104, s 16.

(28th July, 1869)

Proceedings, Home Department, Judicial, August, 1869, Nos 60-64

The Chief Justice should be informed that, when the High Court, North-Western Provinces, was first established, the question of its relations with the Government of India or the Local Government was very carefully considered, and the Governor General in Council, under legal advice, came to the conclusion, upon Statute 24 & 25 Vict, cap 104 section 16, and upon the Letters Patent of the Court, that the relations of the Court were with the Lieutenant-Governor, North-Western Provinces, subject, as provided in the Lower Provinces, to the control of the Governor General in Council It should be added that this, which appears to be the legal, is also, much the most convenient, arrangement, since the Governor General in Council has no special or peculiar knowledge of the North-Western Provinces, so that direct correspondence between the Court and the Government of India could only lead to multiplicity of references and to many unnecessary delays The Chief Justice should therefore be requested to communicate in future with the Local Government, but he might be told that it will always be open to him expressly to request that a particular letter or Minute be forwarded to the Supreme Government.

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No. 94.

Old Presidency Banks

(5th August, 1869)

Proceedings, Financial Departments (Accounts), A, July, 1871, Nos 43-44

Mr. Strachey has not discussed at any length the question of the legal responsibility of the Government for the misfeasances of the Government Directors of the Bank of Bombay, but it will probably be expected that I should express an opinion upon the point It will be understood that, in the first instance, I speak exclusively of *legal* responsibility, as distinguished from moral There is not, I should state, any authority to be found in the sources of law directly bearing on the question, since the constitution of the Presidency Banks is anomalous and unprecedented

this peculiarity, that some of their operations are expressly limited and governed by a legislative enactment—the Act of Incorporation Hence the position of a Government Director who has, however innocently, joined in sanctioning an operation forbidden by the Act of Incorporation, is particularly serious, since he has undoubtedly been concerned in appropriating the shareholders' money to an object expressly prohibited by law I do not, however, think that there is any use in speculating on the liability of particular Government Directors in the Bank of Bombay. We may trust the shareholders to single out for attack those on whom, with the help of the report and evidence, there is any chance of fastening a responsibility. But the serious question for the Government is whether, on a legal liability being attached to any particular Government Director, a corresponding moral liability will attach to Government.

6 I do not myself believe in the general moral responsibility of the Government for not appointing competent Directors Doubtless, there is a sense in which it was its duty to nominate good men, but the duty was to the community which it represents rather than to the shareholders, and it was further limited by the general understanding that it was to appoint from among the Members of the Civil Service, who could not have any experience of banking In any case, the shareholders seem stopped from complaint, since, though they had their choice among experienced mercantile men, they in fact elected Directors even more careless of their interests than the Government Directors, and for the most part equally incapable.

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8 There are a few points on which I differ from Mr Strachey

9 I do not attach the same importance which he does to the possession by the Government of the power to call for full information The Commissioners find that the Government was at first deceived by fallacious returns , unless, then, the Government had good reason to suspect the true state of things, I do not think it can be heavily blamed for neglecting to inform itself further

10 I am not quite sure whether Mr Strachey considers that the omission to make bye-laws invalidates the whole of the operations of the Bank of Bombay The words "it shall be lawful" doubtless are sometimes absolutely imperative, but I hardly think they have that meaning in section 45 of the Bombay Act of Incorporation, if the whole section be read What I understand the Commissioners to mean in their remarks upon this point is, that certain of the operations of the Bank were illegal, because they required bye-laws to legalize them

11 I am not in favour of making a reference at present to the law officers or other counsel If any of the Government Directors are sued, it will be time to consider their case and the moral liability thereby attached to Government, when the grounds of suit are known As to the direct legal responsibility

(*See No 47*)

No 95

ACT XXVI OF 1867, COURT FEES

(*7th August, 1869*)

IT is difficult to conceive anything more unfortunate than this blunder, or to know how we shall now deal with the Secretary of State's despatch

Proceedings Financial Department, A, Separate Revenue (Stamps), August, 1869 Nos 36 37

I must remark that the Under-Secretary is in error when he speaks of this matter as being in the *Legislative* Department Mr Cockerell, as regards the enquiry about stamps, is on special duty in the *Financial* Department, which must decide whether or not his proposals can be sanctioned before the Legislative Department can move.

The question is, in the first instance, wholly financial, it is for purposes of revenue that an impost is levied by judicial stamps I am therefore opposed to sending Mr Cockerell's papers home, because, till the Financial Department gives its opinion, we really do not know whether we can accept Mr Cockerell's proposals, some of which seem to me extremely arguable

Under the circumstances I would suggest that a preliminary reply to Secretary of State be sent, containing the following propositions —

1 That the occasion of the Act of 1867 was the improvement effected by Lord Lawrence's Government in the position of the Lower Judicial services, and of the establishments of the lower Courts It was thought that, to alleviate the heavy additional charge thrown on the revenues, the contribution of the litigating part of the public to judicial expenses might be somewhat raised

2 That the scale of judicial stamps adopted in the Act was the result of the deliberations of a committee of experienced Judges and administrative officers, presided over by Mr Justice Louis Jackson

3 That complaints having been made that the scale was in some respects excessive, a strict enquiry was ordered in all parts of India, the answers to which have only lately come in, and constitute a large mass of papers

4 That these papers are being very carefully examined and sifted, and that, when the Government of India has come to a conclusion upon them, it will be at once forwarded to the Secretary of State

5 That, while the replies received are extremely contradictory,—the four High Courts, for example, being equally divided on the question whether any case has been made out for reducing the scale,—the Government of India, without at present committing itself to any pledge of general reduction is, as at present advised, of opinion that good reason has been assigned for altering the law of 1867 in some particulars, and that an amendment of it in these respects will probably be shortly submitted to the Legislative Council

(*See No 38*)

No 96.

Application of British Indian Law to newly-acquired territory

(*20th August, 1869*)

Proceedings Home Department, Judicial, 4th September, 1869, Nos. 55-57

The Recorder's language is extremely obscure, but there is no doubt as to the law Acts of the Indian Legislature passed before the annexation of a prov-

nce to British India do not apply to that province unless extended to it by—

(1) proclamation immediately upon annexation,
(2) executive order previous to a certain date established by the Indian Councils Act,
(3) order under Act I of 1865,
(4) express legislative enactment.

The case decided by Mr Housman, as far as the facts are disclosed, seems to have been rightly decided But I cannot perceive what Act I of 1865 has got to do with the matter

If the Recorder means to say that an Act of the Legislature, not limited to particular provinces and therefore *primâ facie* applicable to all India, does not, if passed between the period of annexation and that of the enactment of Act I of 1865, apply to Non-Regulation Provinces, he is certainly wrong But perhaps he would call this a case of "express" application

I fail to comprehend what is meant by the "admission" implied in Act I of 1865 The Legislature is not competent to make any such admission

(*See No 99*)

No. 97

FOREIGN ENLISTMENT

(31st August, 1869)

Proceedings, Foreign Department, Political, A, October, 1869, Nos 28 31

"NATURAL-BORN subjects" of the Crown is, in the Statutes affecting India, always taken to mean European British subjects Hence if it is intended to make enlistment of natives *per se* an offence, apart from existing or threatened war, legislation is necessary * * *

No. 98.

SLAVERY, POWERS OF VICE ADMIRALTY COURT AT ADEN

Proceedings, Foreign Department, Political, A, October, 1869, Nos 17 19

By Mr Whitley Stokes (6th September, 1869)—Under 5 Geo IV, c 113, a ship, whether British or foreign (section 36), may be condemned in a Vice-Admiralty Court for an offence in relation to the slave trade

That Statute was extended (in 1842) by 5 & 6 Vict, c 101, to the territories under the government of the East India Company Of these territories Aden was, I presume, then part

If then, the Resident at Aden had been appointed simply a Vice-Admiralty Judge, his Court would have had jurisdiction to condemn the 'Mariannah,' though she is a British ship

But he has only got the powers of a Vice-Admiralty Judge to a limited extent, *i.e.*, only in cases coming under the provisions of Statute 12 & 13 Vict., c 84 (for carrying into effect engagements with certain Arab Chiefs in the Persian Gulf). He has no power to condemn a ship like the 'Mariannah,' which has not violated any of the agreements mentioned in that Statute, and which does not belong to any of the chiefs therein named or to their subjects or dependents

The other Statutes mentioned in the Secretary of State's despatch of 31st July 1861, relate respectively to engagements with the Imaum of Muscat and the Chief of Sohar for the suppression of the slave trade.

By Mr. Maine (*7th September, 1869*) —My law books (or nearly all of them) have been unfortunately sent off to Bombay, and hence I have been obliged to depend on Mr. Stokes for the law applicable to the case, which has to be collected entirely from Acts of Parliament. But I have no doubt that Mr Stokes has correctly described the state of the law The result is that, unless the ship can be got to Bombay, she cannot be properly dealt with

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No 99

Application of British Indian Law to newly-acquired territory

(20th September, 1860)

Proceedings, Home Department, Public, October, 1859, No 17

ACTS of the Government of India passed previously to the annexation of new territory do not apply to that territory, unless expressly extended to it by proclamation at the moment of annexation Here the proclamation speaks of the laws of the Government of India, but that phrase is so vague that I think it must be taken to mean only "law-making power" There is no one body of law, I need scarcely say, which can be called the law of India I should prefer extending the Penal Code under Act I of 1865 And by notification under the Statute of that year European British subjects should be brought under the criminal jurisdiction of one of the High Courts

(*See No 96*)

No 100.

INDIAN CODIFICATION

(17th July, 1879)

Proceedings, Legislative Department, August, 1879, No 219.

I AM highly sensible of the honour which the Government of India confers on me in asking my opinion on various questions relating to the progress of Indian codification, but I have felt from the first that my connection with the Home Government would much diminish my power of giving assistance to the Law Commissioners lately appointed I have concurred in the several despatches which have been addressed by the Secretary of State to the Governor General in Council on the subject of codification, and these despatches apply to almost all the points on which I am now requested to state my views I cannot again conveniently follow Mr Justice Stephen in his criticism on the details of the Bills of which copies have reached this country, since these measures, when they leave the hands of the able and experienced men who constitute the Law Commission, will probably be transmitted to the Secretary of State for an official opinion, and I am disinclined to form my own judgment on their contents before the last words of the Commissioners are known to us

The Secretary of State, in his despatch of 9th August, 1877, stated in general language his acquiescence in the course of procedure which the Government of India proposed to follow in regard to codification For myself I felt too much interest in the continuance of the process to have any wish for interrupting it by objections to order and arrangement, and I was conscious that the transfer to India of the initiative in codifying Bills made it necessary to give wide scope to the ideas of the Law Member of Council for the time being But there is not much impropriety in my acknowledging that I have never been convinced by the arguments of the Government of India for postponing the law of tort (or civil wrong), which were first given in the despatch of 5th July, 1875, and were not recalled by that of 10th May, 1877 The absence of a measure on the subject is the great gap in the body of Indian codified law, and one hardly understands the spirit in which a system of the kind could be framed, with a law of contract enacted, but a law of tort omitted, and, to all appearance, indefinitely postponed I am not in any way satisfied by the reasoning of paragraph 8 of the despatch first above quoted, which, indeed, appears to contradict much of that advanced in the remaining paragraphs of this document. It contends that rights have not become sufficiently settled in India to afford a basis for a codified law of

wrongs But the frank statement of the difficulties of codification which fills much of the despatch, and which almost amounts to a general argument against codification itself, seems to be founded on the assumption that India is full of indigenous legal or customary rules which suffice for the solution of all questions, and that the great danger of codification is that through the necessary conditions of the process these rules may be changed I believe the former view to be much truer than the latter Nobody who has enquired into the matter can doubt that, before the British Government began to legislate, India was, regard being had to its moral and material needs, a country singularly empty of law I think it therefore very possible, and even certain, that there are not in India indigenous rules to guide the courts of justice when questions of civil wrong are brought before them But what is the consequence? Civil wrongs are suffered every day in India, and, though men's ideas on the quantity of injury they have received may be vague, they are quite sufficiently conscious of being wronged somehow to invite the jurisdiction of courts of justice The result is that, if the Legislature does not legislate, the courts of justice will have to legislate, for, indeed, legislation is a process which perpetually goes on through some organ or another wherever there is a civilized Government, and which cannot be stopped But legislation by Indian Judges has all the drawbacks of judicial legislation elsewhere, and a great many more As in other countries, it is legislation by a Legislature which, from the nature of the case, is debarred from steadily keeping in view the standard of general expediency As in other countries, it is haphazard, inordinately dilatory and inordinately expensive, the cost of it falling almost exclusively on the litigants. But in India judicial legislation is, besides, in the long run, legislation by foreigners, who are under the thraldom of precedents and analogies belonging to a foreign law, developed thousands of miles away, under a different climate, and for a different civilization I look with dismay, therefore, on the indefinite postponement of a codified law of tort for India.

The only other point on which I think I can offer an opinion with propriety at the present moment is the general character of the Transfer of Property Bill I am well aware that the precedence given to this measure is in part attributable to the circumstance that a draft law on the subject was sent to India by the Indian Law Commissioners, and, indeed, I long ago considered myself that some measure of the kind was greatly needed for Bengal proper I will add that the present Bill seems to me an extremely well executed simplification of the correspondence branches of English law But the question is, whether, it is desirable in the Indian measure to follow the general lines of this English law. The system of the Bill is a system

I venture to present in an appendix to this paper some unpublished observations of my own on the influence exerted upon law by the Continental systems of land registration The purpose for which they were at first used made it convenient that the illustrations should be taken from Roman law, but the assertions made would prove, I think, to be equally true of the corresponding branches of our own legal system

It is scarcely necessary that I should recommend to the close attention of the Commissioners the remarks of Mr Justice Stephen on the far reaching ambiguity of the word "trust" as understood by English lawyers, and on the high artificiality of the conception which it is meant to express

While I concur with Mr Justice Stephen in considering that a provisional convenience is the utmost that can be claimed for the so called methods of "scientific" arrangement followed or proposed to be followed by the authors of codes, I should be sorry to deny absolutely that, when a reasonably extensive body of substantive civil law has been enacted for India, it may conceivably be arranged in a more compact and more convenient form than that of a series of fragmentary portions successively passed by the Legislature But the question is not of pressing importance The opinion of the Government of India, as stated in its despatch of 24th June, 1878, was that (paragraph 10) a code of civil law might be produced, circulated to the Local Governments, revised and arranged within a period of five years, but the present Secretary of State, in paragraph 6 of his despatch of 5th September, 1878, has expressed his strong objection to "any scheme for compressing the completion of the Civil Code within a period of five years or any other definite time" And many other circumstances help to show that the expectations of the Government of India on the point were much too sanguine

I desire to terminate this brief paper with an assurance that my services are at all times at the disposal of the Government of India, and that the reasons given in my first paragraph are exclusively those which have made me hesitate to follow Mr Justice Stephen in criticism on the detail of the "six codifying Bills" I am bound to add that, subject to the general observations made above, and subject to some doubts as to portions of the detail which I share with Sir James Stephen, the six Bills seem to me to deserve admiration, more especially for the skill and labour manifest in their workmanship

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APPENDIX

"The suggestion has often been made that real property should be closely assimilated to personalty, more especially in respect of conveyance There ought to be no more difficulty, it

is said, in transferring a piece of land than in selling a horse I believe the analogy to be unsound, and the route indicated a false one There is far more promise in reversing than in extending the principle, in treating land as essentially unlike moveables, and in a return to the ancient methods of conveying allodial land The subject is, for several reasons, worthy of our attention

"It is to be recollected, first, that the primitive conveyances of allodial land were, before all things, public Land belonged to the tribe, joint family or village community before it belonged to the individual household, even when it became private property, the brotherhood retained large rights over it, and without the consent of the collective brotherhood it could not be transferred The public consent of the village to a sale of land is still required over much of the Aryan world Although, as we know the 'mancipation' in Roman legal history, it is a form of private transfer, it plainly bears the stamp of its original publicity The five witnesses who had to assist at a 'mancipation' represent the old consenting community, according to a principle of representation by fives widely diffused among primitive races As a private conveyance, 'mancipation' was extremely clumsy, and I have no doubt it was a great advantage to Roman society when this ancient conveyance was first subordinated to 'tradition,' or simple delivery, and finally superseded by it Nevertheless, the most successful modern experiments have reverted in principle to a method of transfer even older than 'mancipation,' and the latest simplifications of the conveyance of land are a reproduction of the primitive public transfers in the face of the community, in a new form appropriate to large and miscellaneous societies

"In France, and in the territories incorporated with the Empire of Napoleon I, there has existed, ever since the establishment or introduction of the Code called by his name, a system of publicly registering sales and mortgages of land In some of the Germanic countries there was long a disinclination to adopt these expedients, but they have now been almost universally copied on the Continent, and, as sometimes happens, the new system is most perfect where the delay in accepting it was longest The land registries which receive the highest commendation from juridical writers are those of certain small Teutonic communities, for instance, the State of Hesse-Darmstadt and the Canton of Zurich I can here give but a brief description of the mechanism The land of the community is divided into a number of circumscriptions of no great area For each of these a central office is established, with a staff of functionaries, who are to some extent experts, and at each office a register is opened in which separate portions, or groups of pages, are appropriated to separate masses of land There has been some controversy as to what the area selected for separate

treatment should be—whether a space determined by land measurement, or, as we should say, an *estate*, an aggregate of lands once held as a single property, but I believe that the historical system—that which deals with estates rather than with areas settled by land surveyors—has been found practically the most convenient When the register has once been opened, the legal history of every parcel of every area is thenceforward recorded in it, and every transfer or mortgage must be registered in it under pain of invalidity. Whether a person wishing to sell or mortgage has the right to do so, it is the business of the staff of experts to ascertain It is absolutely essential to the system that the register should be easily accessible, and the formalities of registration simple and cheap

"The nearest English analogy to this new foreign system is to be sought in the court rolls of manors, and it is sometimes asserted by lawyers that the manifold disadvantages of copyhold property are compensated by the many conveniences arising from its registration in these rolls As to the great mass of English freehold property, there is a general admission among lawyers of the expediency of registration, but vehement dispute as to the best method, and a certain disposition to look upon the practical difficulties as insuperable It is true that these difficulties are far greater than abroad Our land law is much more complex than the land law of Continental countries, where it has its counterpart, if it has any, in the exceptional law applied to the estates of a limited number of noble families, and English real property law has been still further complicated by the liberty of transfer and devise which we have enjoyed from a comparatively early period The great difficulty with us lies in the preliminary process of ascertaining whether a person desirous of selling or mortgaging has the right to do it, but this in most Continental countries is a comparatively easy matter, the bulk of the land having been held, until the early part of this century, by a tenure of strict villeinage, or, as we should say, in copyhold

"My immediate object, however, is not to pass a eulogy on the principle of conveyance by entries in a register, or to weigh one system of registration against another I wish rather to point out some remarkable consequences of registration which ought to have our attention in our special branch of study A short time since I stated that the problems once solved by the expedient of 'warranty' were common to all bodies of jurisprudence What is to be done in the case of the man who is in fact exercising all the powers of an owner, but who bas no title to show? Is he to be at the mercy of anybody who chooses to injure or disturb him? The Roman law answers this question by providing the vast body of rules which constitute the chapter on Possession What has to be done with the man who has bought with the proper formali-

ties, but not from the true owner, or from the true owner but not with the proper formalities? The answer of the Roman law consists in the doctrines of '*bonâ fide* possession,' and of 'ownership *in bonis*,' 'bonitarian' or equitable ownership Is the bonitarian owner or the possessor, with or without good faith, always to have an imperfect title? The reply is in the great departments of law concerned with usucapion and prescription If a man mortgages his property to a number of creditors, in what order are they to be satisfied? The volume of rules by which all systems try to solve this problem is quite enormous But it is very remarkable that, where there is a perfect system of land registry, the strong tendency is to revert to the doctrines of Roman law as it must have been before possession, usucapion and bonitarian ownership grew up The registry of the sale or mortgage of land being extremely easy, expeditious and cheap, there is a marked disposition among the authors and expositors of law to say to the members of the community—Either register your transfers or mortgages, or cause them to be registered, or you shall have no rights whatever If you neglect doing that which it is in your power to do at any moment, and at a trifling cost in time and money, you shall not have the benefit of possession, of bonitarian ownership, or usucapion, or prescription At most there shall be an action of contract to compel the seller of land to register and the buyer to pay the purchase-money As regards mortgages, they shall rank in the order of priority of registration, and if you delay going through the proper formalities, or compelling them to be gone through, you, the mortgagee, will be postponed to creditors more diligent than yourself, and you will be satisfied after them

"I follow German writers of authority in saying that this is the condition to which legal doctrine is approximating in much of Germany though it is not quite adjusted to it The singular result is that some of the most intricate and difficult chapters of law cease to be of any or much importance The expedient of public registration is, it will be seen, purely mechanical, a contrivance, very like it in principle, spontaneously and very early suggested itself to the human race, nevertheless, where a public registry of mortgage and land transfer has been established, some of the most famous and luxuriant branches of law show a tendency to dwindle and wither away under its shadow Possession, usucapion, bonitarian ownership, and hypothek occupy together a prodigious space in the Roman jurisprudence, the bulk of what corresponds to them in other systems of law is very great, if they are reduced to a fraction of their present dimensions, the diminution of the aggregate body of law will be extraordinary, and will have been produced in a most unexpected way

"I have dwelt on these Continental systems of land registration and on the effects attributed to them by German juridical opinion, for two reasons

"In the first place, the fact is certainly curious that the latest improvements in the mechanism of mortgage and land transfer involve a reversion to the primitive publicity of conveyance The public register at some accessible spot, in which all transactions must be registered under penalty of immediately forfeiting all their benefits, pretty much corresponds to the primitive assembly of the village, before which all transfers of shares in the domain must be accomplished, in order that the brotherhood may consent to them, and supply evidence of them by the general recollection It is true that the ancient formalities had one object which has nothing to do with the modern The primitive publicity of transfer went with a most rigid exclusiveness, and the public consent, which was insisted upon, was employed to refuse the power of purchase to strangers The decay of the ancient public conveyances was very probably caused by a change of circumstances, which made the communities either unable or unwilling to maintain their collective control over the land of their domain In modern India the growth of wealth has greatly stimulated the spirit of individualism , buyers and sellers of land alike become impatient of the necessity for obtaining the public consent of the villagers to their bargain, the modern Anglo-Indian law is unfavourable to these archaic restrictions, and thus the primitive public methods are everywhere giving way to private transfers, which assume, I am sorry to say, at present very heterogeneous forms In the historically ancient world the same results were most probably produced by conquest, and by the absorption of one or more of the primitive proprietary groups by others stronger than themselves

"In the Roman State, including a population even more and more miscellaneous, we find at the outset of legal history a mere shadow of the old forms of transfer in the 'mancipation,' and mancipation, long before its abolition by Justinian, was subordinated by every sort of legal contrivance to mere delivery or 'tradition' Yet even tradition, when it became the sole Roman conveyance, retained some trace of the institutions out of which it grew The Roman law never to the last allowed the dominion or right of property to be passed from one person to another by a mere contract, it was absolutely necessary that the contract should be followed by the delivery of the thing which was its subject This is a peculiarity which has, more than once, caused perplexity to persons who have consulted the Roman law of transfer in ignorance of its being founded on a principle which the English law and the French Code have abandoned

"The other fact to which I wish to call attention is not merely curious but highly instructive The tendency of German juridical opinion which I have mentioned shows that we are in danger of over-estimating the stability of legal conceptions Legal conceptions are indeed extremely stable, many of them

have their roots in the most solid portions of our nature, and those of them with which we are most familiar have been for ages under the protection of irresistible sovereign power. Their great stability is apt to suggest that they are absolutely permanent and indestructible, and this assumption seems to me to be sometimes made, not only by superficial minds, but by strong and clear intellects I am not sure that even such juridical thinkers as Bentham and Austin are quite free from it They sometimes write as if they thought that, although obscured by false theory, false logic and false statement, there is somewhere, behind all the delusions which they expose, a framework of permanent legal conceptions which is discoverable by an eye looking through a dry light, and to which a rational code may always be fitted What I have stated as to the effects upon law of a mere mechanical improvement in land registration is a very impressive warning that this position is certainly doubtful, and possibly not true The legal notions which I described as decaying and dwindling have always been regarded as belonging to what may be called the osseous structure of jurisprudence The fact that they are nevertheless perishable suggests very forcibly that even jurisprudence itself cannot escape from the great law of evolution,"

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